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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARITIME OVERSEAS CORP.,

Petitioner,

-against-

STEWART V. DIXON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was petitioner* deprived of its right to a fair trial under the due process clause of the Fifth Amendment by the extra-judicial personal bias of the trial judge existing at the inception of the trial but recognizably manifested for the first time in the opinion of the trial judge denying petitioner's motion for judgment notwithstanding the verdict or for a new trial?

2. Did the summary affirmance by the Second Circuit Court of Appeals constitute so far a departure from the usual course of judicial proceedings, or the sanctioning of so far a departure by the District Court, as to call for exercise of this Court's powers of supervision?

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* Statement under Rule 28.1 of the Rules of the Supreme Court of the United States: all out-outstanding shares of petitioner Maritime Overseas Corporation ("MOC") are owned by Mr. Ran Hettena who is the President and a director of MOC. Mr. Hettena, together with two other directors of MOC, is a director of Overseas Shipholding Group, Inc.

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PETITION OF MARITIME OVERSEAS CORP. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the trial court is reported at 490 F. Supp. 1191 (SDNY 1980) and is set forth in Appendix B. This opinion was rendered on petitioner's motion for judgment notwithstanding the verdict or a new trial. Petitioner's appeal to the Second Circuit Court of Appeals was disposed of by summary order on December 29, 1980. The order of the Court of Appeals is set forth in Appendix A. Petition for rehearing and for rehearing en banc was denied by the Circuit Court of Appeals for the Second Circuit on March 16, 1981. A copy of the order of denial is set forth in Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Constitution of the United States, Amendment V - Capital Crime; Double Jeopardy; Self Incrimination; Due Process; Just Compensation For Property:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of live, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation".

28 U.S.C. §455(a) and (b)(1):

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his inpartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

(1) Where he has a perronal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings.

STATEMENT OF THE CASE

Respondent-plaintiff, an able bodied seaman aboard petitioner-defendant's vessel, injured his left knee and brought a seaman's personal injury action pursuant to 46 U.S.C. §§688 et seq. (The Jones Act). After jury trial, judgment was entered in the United States District Court for the Southern District of New York in plaintiff's favor in the sum of $137,776 on January 17, 1980 (Appendix D). Of this sum, $108,000 represented the jury's award for damages sustained by plaintiff as a result of the unseaworthiness of the vessel. The remainder of the verdict, $29,776, represented the jury award for maintenance and cure.

Defendant timely moved for judgment notwithstanding the verdict, or, in the alternative, for remittitur. The affidavit of trial counsel for defendant in support of the motion is set forth in Appendix E. The District Court denied defendant's motion for judgment notwithstanding the verdict and granted remittitur or, in the alternative, a new trial with respect only to the award of maintenance and cure, from $29,776 to $572, which remittitur was accepted under protest by attorneys for the seaman. The award for maintenance and cure was not appealed nor is it a subject of this petition.

Thereafter, petitioner timely moved the trial court for re-argument of the motion for judgment notwithstanding the verdict. The affidavit of defendant's trial counsel in support of the motion for reargument is set forth in Appendix F. The motion for reargument was

denied by the trial court by Memorandum Order which is set forth in Appendix G.

REASONS FOR GRANTING THE WRIT

1. The Extra-Judicial Personal Bias of the Trial Judge Denied Petitioner A Fair Trial.

At the inception of the trial of the instant case, and prior thereto, the trial court entertained a blinding personal bias against trial counsel for the defendant of which counsel had no reason to be aware, and which had its source in a wholly unrelated prior lawsuit in which counsel for the defendant here had participated.

The trial court's decision denying petitioner's motion for judgment notwithstanding the verdict, referring to petitioner's counsel by name 17 times in the space of three pages of the opinion under the caption "The attack on the trial judge by the lawyer for defendant", discloses a virulent animosity toward

petitioner's trial counsel. By the numerous and unprecedented references in that opinion to the case of Milos v. Sea-Land Service, Inc., 478 F. Supp. 1019 (SDNY1979), affirmed 622 F.2d 574 (2d Cir. 1980), in which petitioner's attorney was trial counsel before the same court, the trial judge improperly availed himself of the opportunity to air his grievances against, and distaste for, defendant's trial counsel. The animus for such a venomous opinion, so often referring to the attorney by name in a published opinion was, unmistakably, an effort to injure the reputation of the lawyer involved.

In the Dixon opinion (490 F. Supp. 1191, 1197-1198 (1980)), the court states:

> "Mr. Stearns' repetitive charges of judicial partisanship, erroneous charges etc., in this matter, and in the Milos case, reflect the arid waste-land of his arguments...

> The extensive list of what he regards as outrageous in the instant case, essentially the same as was emphasized by him in Milos (though even considerably more egregious in that case), was filed by Mr. Stearns before our Circuit Court of Appeals decided the Milos appeal. It should be borne in mind that the moving papers before us now were filed on January 28, 1980. His brief on appeal in Milos was filed March 19, 1980."

This is a ruthlessly disingenuous suggestion that the trial court was unaware at the inception of the Dixon trial that trial counsel had objected to the conduct of the court in the course of the Milos trial. The affidavit in support of the motion for reargument of petitioner's motion for judgment notwithstanding the verdict in the Dixon case (Appendix F) contains a detailed recitation of the misconduct of the trial ascribed by defendant's counsel, petitioner's counsel here, to the trial court in the Milos case by affidavit

which was sworn to by petitioner's counsel June 20, 1979, almost a year before filing of the brief on appeal, to which the trial court refers.

In the Dixon opinion the trial court states, 490 F. Supp. at 1196:

> "We find it extremely difficult to contain the urge to tell Mr. Stearns 'off'. We feel compelled, at the very least, to denounce this as not rising to the dignity of contempt."

It is worthy of note that these observations are contained in an opinion released April 23, 1980, one month after the Court of Appeals decision in the Milos case which rejected defendant's contentions of judicial misconduct.

In the case at bar, the Court states (490 F. Supp. at pp. 1196, 1197) that "the abuse heaped upon [it] by Mr. Stearns is of the same caliber in both cases" ("though even considerably more egregious in [Milos]").

The opinion of the trial court in the case at bar, considered alone, is sufficient indication that the trial court entertained a personal antipathy for trial counsel which denied petitioner a fair trial. When the opinion is considered with the clarity of hindsight in the light of the proceeding conducted by the trial court after jury selection, and thereafter sealed by the Court, the extra-judicial bias of the trial judge against petitioner's counsel existing at the commencement of trial is conclusively established. The transcript of these proceedings is set forth in Appendix H. The transcript was released by the trial court, after prior refusals, only when petitioner sought release by writ of mandamus.

As appears from the transcript, the proceedings conducted, ostensibly to

rebuke counsel for plaintiff and defendant for not complying with a direction of the trial court to file trial memoranda, is correctly viewed as an excoriation of counsel for defendant only. Counsel for plaintiff quickly assuaged the wrath of the Court, as addressed to him, by reciting "I can only humbly apologize", "most humbly, and abjectly, and I mean that, Your Honor", offering illness in his office as a reason for default, stating "However, Your Honor, from my heart and my soul as a member of the bar and an officer of this Court I promise this Court that a situation like this will not crop up again and I humbly beseech the Court's forgiveness for this remission", and concluding "I must beseech Your Honor's forgiveness". (Appendix H, pp. 18, 19, 23).

Counsel for defendant, when asked by the Court for an explanation of

the failure of defendant to file a trial memorandum as directed by the Court, stated that he did not know the fact of the matter but was sure that it had been the result of an oversight and "that is no excuse. It is not intended surely as any slight to the Court or to the office or anything at all of that nature. It seems to have been an oversight." The Court's response was "I don't want your 'it seems'. I want something a hell of lot more than that, Mister." (Appendix H, pp.25, 26).

After the Court had been assured by defendant's counsel that the matter would be looked into and would never happen again, the Court again rejected the response of counsel for the defendant to the Court's inquiry with respect to failure to file a trial memorandum and stated "you thought you would give me that stuff because, Mr. Stearns,

candidly speaking with you, I have long detected that would have just exactly be what I would expect from you." (Appendix H, p. 27). The Court then demanded, and received, the statement of defendant's counsel that he would take the matter up with members of his firm and submit to the Court "the answer in writing". (Appendix H, p. 28).

The Court then inquired of defendant's counsel "How do you like that as a sense of fair play?" Counsel replied that it was "fine" and reiterated that he knew that the Court always acted out of a sense of conviction and attempted to do the right thing "in the right way as the Court sees it". Counsel for the defendant did state that "there are instances that I for one and perhaps others do not agree that your approach or your choice of treatment of a particular

situation is what we would do had we the exalted position that you have."

When invited by the Court "what would you do here?" counsel for the defend-defendant responded:

> "Sir, I would attempt to find out, as you did, why. However certainly with respect to the better excuse offered by Mr. Cohen (plaintiff's counsel), I would feel that that was absolutely sufficient. I would not take undue umbrage or undue time in light of such an explanation of what happened. It is, of course, a somewhat different thing with respect to the defendant's memorandum." (Appendix H, pp. 30-31).

This response by defendant's counsel, exculpatory only of his adversary, produced a torrent of outrage from the Court which requested that the letter of counsel for defendant's firm state what their feeling was about trial counsel's response to the Court's inquiry as to what trial counsel would have done in the judge's place.

The letter requested was read into the record on the following day and evoked the following response from the Court:

> "I doubt very much whether a completely accurate report was made by Mr. Stearns to the firm of just what it is that he, Mr. Stearns, said as to how he would have handled the situation were he the Judge.
>
> "That not only is disrespectful, it is typical of someone saturated with conceit who has not even a nodding acquaintance with humility."

On inquiry from the Court on whether it had made itself clear, defendant's counsel moved for a mistrial "in view of the Court's attack on my personal integrity".

The motion was denied and the matter proceeded to trial. (Appendix H, pp. 40-41).

The trial judge in the case at bar should have recused himself under 28 U.S.C. §455 when the case was assigned to him, and most certainly after the

proceeding in connection with failure to file trial memoranda and the motion of defendant's counsel for a mistrial. He entertained a seething animosity toward defendant's counsel of which only he was aware. There is no indication in the Milos opinion of the trial court's reaction, expressed in the Dixon opinion, to the charges of judicial misconduct made therein beyond a simple rejection of the charges, nor was any reference to Milos made at any time in the case at bar before or during the trial. To counsel for defendant, the excoriation which he endured at the proceeding on the trial memoranda was prompted only by that incident. Counsel for defendant made no motion that the judge recuse himself. It was only when the decision in the case at bar was rendered that the correlation between the Milos trial and the severity of the strictures placed upon defendant's

counsel in the proceeding on the trial memorandum, and on the subsequent conduct of the case by the trial judge, was perceived.

While no thought of recusal was entertained by defendant's trial counsel, recusal was not absent from the mind of the trial court. In the course of the proceeding on the trial memoranda, the court castigated the activity, or inactivity, of counsel who had initially appeared before the court, characterizing counsel for the plaintiff as "flippant" and counsel for defendant as "uppity". (Appendix H, pp. 16, 8). Initiating the proceeding on the trial memoranda the court stated:

> "I recognized both of you when the case was called. If you had sent your original emissaries here I might well have sent this case to be tried before another judge". (Appendix H, p. 3).

This clearly suggests that the court's reaction to "flippant" and "uppity"

counsel had given rise to feelings on the part of the court which would have compelled him to refer the case to another judge if these counsel had appeared before him for the trial. This sensibility did not extend to trial counsel for the defendant whom the Court, in its rage, would not relinquish. It is not asserted that the trial court sought by way of cold calculation to injure trial counsel for defendant, and necessarily his client, but that the court's state of mind was such that that result inevitably flowed from the trial court's personal bias engendered by the Milos case which had absolutely no connection with the case at bar except the fact that Joseph T. Stearns was trial counsel for the defendant in both cases.

The rule of law applicable here has been articulated by this Court on numerous occasions and was succinctly stated

in In Re Murchison, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness ... This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law'. Tumey v. Ohio, 273 U.S. 510 532, 71 L.Ed. 749, 758, 47 S. Ct. 437, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform this high function in the best way 'justice must satisfy the appearance of justice'. Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S. Ct. 11."

The opinion of the trial judge, denying petitioner's motion for judgment notwithstanding the verdict, displays to the world to which it was published the very visage of the injustice which it

represents even though it does not disclose on its face that the contentions of defendant's trial counsel concerning the conduct of the trial judge in Milos were brought to the attention of the trial judge, by motion, long in advance of the trial of the case at bar.

Here, the existence of the extra-judicial bias against trial counsel for defendant is established by the Court's opinion after trial but was not apparent before, or at, trial. The belated manifestation of the bias relegates petitioner to the remedy of appeal and its very existence requires reversal, even though a reviewing court might feel that the trial result was sound. Berger v. United States, 255 U.S. 22 (1921); Whitaker v. McLean, 118 F.2d 596 (U.S. C.A., District of Columbia, 1941); Knapp v. Kinsey, 235 F.2d 129 (6 Cir. 1956) cert. den. 352 U.S. 892; United States v.

Sciuto, 531 F.2d 842 (7 Cir. 1976); United States v. Brown, 539 F.2d 467 (5 Cir. 1976); Nicodemus v. Chrysler Corp., 596 F.2d 152 (6 Cir. 1979); State v. Nunes, 99 Rhode Island 1, 205 A.2d 24 (S.Ct. of Rhode Island, 1964).

The trial judge erred in failing to recuse himself pursuant to 28 U.S.C. §455(a) and (b)(1) in view of the extra-judicial bias against defendant's attorney disclosed by the opinion and, retrospectively in light of the opinion, the proceedings in connection with the failure to file trial memoranda. Lacking knowledge at the time of the existence of the bias, trial counsel for defendant did not move for recusal but he did move for a mistrial by reason of the court's attack on his personal integrity. The motion for mistrial on this ground should have served to bring pointedly to the attention and conscience of the court the

existing bias manifested in the opinion and the impropriety of the trial court sitting on this case. The court which entertained the bias should have recused itself.

As stated in Davis v. Board of School Commissioners of Mobile County, et al., 517 F.2d 1044 (5 Cir. 1975) cert. den. 425 U.S. 944, at p. 1051:

> "Section 455 is the statutory standard for disqualification of a judge. It is self-enforcing on the part of the judge. It may also be asserted by a party by motion in the trial court, Rapp v. Van Dusen, 3 Cir., 1965, 350 F.2d 806, 809; through assignment of error on appeal, United States v. Seiffert, 5 Cir., 1974, 501 F.2d 974; ..."

See also: Nicodemus v. Chrysler Corporation, supra, wherein the court stated in footnote 10 at p. 157:

> "The Court is not in a position to determine whether or not Judge Young could in fact conduct future proceedings in this case in an unbiased fashion; nor do we presume that he could not. However, we are firmly of the view that he should

disqualify himself pursuant to 28 U.S.C.A. §455(a)..."

In Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), Mr. Justice Frankfurter declined to sit on a case involving radio service in passenger vehicles of a street railway company. His reasons therefore, set forth at p. 466-467, are instructive:

> "The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of the case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe that they are operating, judges recuse themselves.

> They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.
>
> This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it..."

There would appear to be no question but that disqualification was required of the trial judge in this case pursuant to 28 U.S.C. §455(a) because the trial judge's "impartiality might reasonably be questioned". In SCA Services, Inc. v. Morgan, 557 F.2d 110 (7 Cir. 1977) relationship of the trial judge to an attorney for one of the parties was held to be a source of partiality. In Smith v. Sikorsky Aircraft, 420 F. Supp. 661 (U.S.D.C. C.D. Calif. 1976), the sitting judge, sua sponte, disqualified himself where an attorney for one of the parties had been the judge's attorney in

another matter although the judge expressly found that he had no personal bias or prejudice concerning any party. He did so on the ground that his impartiality might reasonably be questioned under 28 U.S.C. §455(a).

Affinity and business relationship, seen as grounds for recusal, are non-volatile factors not likely to give rise to a "bent of mind". Here we have a fixed and enduring animus to which free rein was given, and freely expressed after trial only after the Court of Appeals decision in Milos.

It is submitted that the trial court here should have disqualified itself under 28 U.S.C. §455(b)(1) as well. We are not unmindful of authority to the effect that a judge's personal bias against an attorney, as opposed to the party, does not generally fall within its purview. Davis v. Board of School

Commissioners of Mobile County, supra. However, as the court in Davis noted, there may well be a case where "constructive" bias against the party will be found by virtue of the court's bias against the attorney. Id. at 1051; see, also, United States v. Ritter, 540 F.2d 459, 462 (10 Cir. 1976), cert. den. 429 U.S. 951 (1976).

In Wolfson v. Palmieri, 396 F.2d 121, 124-125, (2 Cir. 1968) the court stated:

> "Conceivably also, ... contacts during a trial might themselves have created such a degree of irritation with a party or his lawyer as to create the bent of mind to which the Supreme Court referred in Berger." [Berger v. United States, supra]

In Offutt v. United States, 348 U.S. 11, 14 (1954), where it was held that a judge ought not to preside over a contempt case arising out of proceedings before him, the court stated "but judges

also are human and may, in a human way, quite unwittingly identify offense to self with obstruction to law". It is to prevent the all too human reaction evidenced in the district court's opinion in this case that a recusal statute exists in the first place.

It is worthy of note that the Offutt contempt proceeding arose out of the trial of Peckham v. United States, 210 F.2d 693 (C.A., District of Columbia, 1953) in which the conviction of the defendant was reversed because " ... the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury, ... " (p. 702).

The very existence of the bias of the trial judge against defendant's

counsel, standing alone, deprived defendant of its due process right to a fair trial but the hostility to defendant's counsel, and the resultant prejudice to the defendant, were manifested to the jury in the course of the trial as it was in Peckham. This will appear in petitioner's consideration of the reasons advanced by the Court of Appeals for affirmance.

THE SUMMARY ORDER OF AFFIRMANCE

The reasons advanced by petitioner herein why the writ should be granted were urged before the Court of Appeals and rejected.

It is submitted that the opinion of the Court of Appeals, by way of summary order, affirming the judgment has seriously misconstrued the record in this case. That record, particularly the District Court's post-trial opinion, reveals a proceeding in which by virtue

of the trial judge's antipathy to defendant's trial attorney, he ceased to represent the "impersonal authority of law". Offutt v. United States, supra, at p. 17. Defendant, therefore, was deprived of the most basic constitutional guarantee of due process: a fair trial in a fair tribunal where justice satisfies the appearance of justice.

In its opinion, the Court of Appeals held that defendant had not raised the recusal issue in a timely fashion. It rejects defendant's contention that the extra-judicial bias of the trial court did not become apparent until the opinion of the court was published in this case as "unpersuasive" because it required the court to assume that defendant's trial attorney perceived bias in the behavior of the trial judge and could not connect his own recent and

"assertedly 'bitter' encounter" with the trial judge in the Milos case.

It must be stated that the appeal in Milos was based on several grounds, but primarily upon errors in the judge's charge to the jury. While defendant also raised issues of judical misconduct in that case, this misconduct was very different from the issues raised on the instant appeal. There was absolutely no question raised in Milos of bias against defendant's trial attorney. The issues raised by defendant's trial attorney in Milos were not reflective of any "bitter" encounter between the trial attorney and the trial judge, although they clearly indicated a difference of opinion as to the proper conduct of a trial. Moreover, the post-trial opinion of the District Court Judge in Milos, does not provide any indication of the

antipathy which the trial judge felt toward defendant's trial attorney.

It was urged by petitioner in the Court of Appeals that "the trial judge had become so bitterly and personally embroiled with defendant's attorney over the Milos case that he was unable to approach that attorney's client in this proceeding in a judicious and dispassionate manner." The Court of Appeals apparently construed this language to mean that the trial in Milos had been "bitter". It was not so intended. What defendant's counsel attempted to convey to the Court of Appeals was that the opinion in this case establishes that the trial judge became bitterly and personally embroiled with defendant's attorney over the Milos case, after the post-trial motion in that case. That bitterness was revealed only in the opinion in this case.

It would appear to be self-evident that defendant's counsel who had moved in this case for a mistrial on the ground of the court's personal attack on his integrity would most certainly have moved for recusal on the ground of extra-judicial personal bias if the trial court had brought the existence of the court's bitterness to his attention in the proceeding on the trial memoranda or at trial. The opinion of the Court of Appeals on the issue of timeliness implies that a trial attorney who raises the issue of judicial misconduct on an appeal must scrutinize his next appearance before the trial judge; and, if the judge indicates any hostility toward counsel whatsoever, he must immediately move for the judge's recusal, notwithstanding that the perceived antagonism may be wholly unconnected with the earlier proceeding.

Indeed, the Court of Appeals' opinion seems to assume that it is natural for a trial judge to harbor this type of hostility when his conduct of a trial is challenged on an appeal. Such an assumption is clearly not valid, nor is it just to the bench as a whole.

The Court of Appeals effectively rebuts its reasoning on this issue when it states as one of the reasons why it discerns no extra-judicial bias that "the record shows that plaintiff's counsel was also strongly reprimanded for the same failure." If the proceeding on the trial memoranda was only a rebuff to counsel for plaintiff and defendant equally, there is no reasonable basis to conclude that counsel for defendant should have detected bias against himself and moved for recusal at that time.

The Court of Appeals finds no merit in defendant's argument of "extra-

judicial bias" because the trial judge ruled in favor of defendant in a number of matters, for example, dismissing plaintiff's negligence cause of action and in reducing the jury's award for maintenance and cure. This was an action by a seaman based on a claim of unseaworthiness and of negligence under the Jones Act. The District Court, in effect, dismissed the claim that defendant knew or should have known of the existence of a defective appurtenance, and was therefore negligent, but sent the case to the jury on the issue of unseaworthiness which is liability without fault. The reason for reducing the maintenance and cure award is amply set forth in the trial judge's post-trial decision. He simply had no other alternative. Avoidance of reversible error does not establish impartiality. These two points seem to be of no real significance.

The Court of Appeals disposes of the argument of the defendant that the trial judge sponsored testimony favorable to plaintiff by stating that the record shows that the judge was simply clarifying the testimony of witnesses. It is submitted, with respect, that the Court of Appeals' view in this area is wholly incorrect. The trial judge intervened in the cross-examination of plaintiff's medical expert when defendant's attorney was in the midst of confronting the witness with plaintiff's medical records which lacked any support for the contention that plaintiff had sustained a permanent or serious injury, and with plaintiff's refusal to have an arthroscopy, to ask the witness: "they wouldn't be taking all these steps unless there was something more than a scrape of the knee, is that not so?" The witness agreed and the following colloquy occurred:

"The Court: Next question.

Mr. Stearns: For the record --

The Court: You don't like that question?

Mr. Stearns: No, Sir, I don't.

The Court: You have a right not to like it. I like it and I wanted to make that clear to the jury. It doesn't help you any and you don't like it for that reason. I want it and it's there.

Mr. Stearns: I say it is improper.

The Court: Do you? That is your notion. Strike the insolence of counsel.

Next Question.

[Excerpts Transcript of Trial, Appendix I,pp. 1-2].

Other instances of the court's partisan interference with cross-examination, not adverted to by the Court of Appeals, are to be found in the trial transcript. (Appendix I, pp. 2-8). Defendant's motion for mistrial based on such

interference was denied. (Appendix I, p. 9).

This was not permissible clarification of the record but outright advocacy and the colloquy quoted is clear evidence of the hostility of the Court to defendant's counsel. There is no apparent basis for the statement of the Court of Appeals that "defense counsel helped to bring this reproof upon himself." Concerning the "strike the insolence of counsel" incident the trial court (490 F. Supp. at p. 1198) states:

> "What this trial lawyer also fails to reveal is that his comment was uttered belligerently, his facial expression recorded contempt. His movements depicted disdain for the trial judge - an attitude he displayed on a few occasions before and during the trial.
>
> ...The attorney must never forget that at all times he has a dual role; he is an officer of the Court as well as an attorney for his client. The disrespectful approach is bound to bring on judicial retort..."

To this petitioner responds with the following from United States v. Brown, 539 F.2d 467, 469 (5 Cir. 1976):

> "The record does not reflect the tone of voice of the judge, his facial expressions, or his unspoken attitudes and mannerisms, all of which, as well as his statements and rulings of record, might have adversely influenced the jury and affected its verdict.
>
> Within the purview of a fair trial, the judge himself is on trial, and must be always aware of that fact."

See, also: Anderson v. Great Lakes Dredge & Dock Co., 509 F.2d 1119, 1131-1132 (2 Cir. 1974).

The Court of Appeals also rejected the contention of defendant that the trial judge abused or failed to exercise its discretion in denying defendant's motion for a new trial. It was, and is, petitioner's contention that a biased trial judge is incapable of a proper exercise

of discretion.* As this Court stated in Langnes v. Green, 282 U.S. 531, 541 (1931):

> "The term 'discretion' denotes the absence of a hard and fast rule. ...When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

It is respectfully submitted that in affirming by summary order the Court of Appeals acted in the belief that defendant's counsel was merely the fellow victim with plaintiff's counsel of a chronically choleric trial judge (vide: Anderson v.

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* Certainly, an unbiased judge, in the exercise of a sound discretion, might well have entertained a more receptive view on the excessiveness of the damage verdict in the amount of $108,000 for an injury on August 3, 1978 which the records of treatment demonstrate to have been minimal, and after which plaintiff was marked fit-for-duty on October 9, 1978 and resumed his maritime career, as urged in the affidavit in support of the motion for judgment notwithstanding the verdict. (Appendix E, pp. 3, 6-9).

Great Lakes Dredge & Dock Co., supra) and disposed of the case on that basis without proper consideration of the constitutional issue involved.

Impartial judicial ill-temper displayed in the course of the trial is not the issue in this case. The issue is whether petitioner was deprived of a fair trial by pre-existing extra-judicial bias against petitioner's attorney, disclosed for the first time in the post-trial opinion. It is respectfully submitted that it was and that this issue must be met.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
June 15, 1981

Respectfully submitted,

JOSEPH T. STEARNS
40 Wall Street, 59th Floor
New York, New York 10005
(212) 344-4700
Attorney for Petitioner

APPENDIX A

SUMMARY ORDER OF AFFIRMANCE OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of December, one thousand nine hundred and eighty.

Present:
HONORABLE WILFRED FEINBERG
Chief Judge
HONORABLE AMALYA L. KEARSE
Circuit Judge
HONORABLE DAVID N. EDELSTEIN
District Judge

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

STEWART V. DIXON,

Plaintiff-Appellee-Cross Appellant.

-against-

MARITIME OVERSEAS CORP.,

Defendant-Appellant-Cross-Appellee.

[STAMPED:] UNITED STATES COURT OF APPEALS, FILED DECEMBER 29, 1980, A. DANIEL FUSARO, CLERK, SECOND CIRCUIT
80-7408
80-7456
[handwritten:
80-7408
80-7456]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Defendant Maritime Overseas Corporation appeals from a judgment in favor of plaintiff Stewart V. Dixon, in the amount of $108,576, after a jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, J. Plaintiff was a seaman aboard defendant's vessel when he was concededly injured in the left knee. He sued under 46 U.S.C. § 688 (the Jones Act), alleging negligence, unseaworthiness, and a failure of maintenance and cure. Upon defendant's motion, the trial judge dis-

missed the negligence cause of action. The jury later returned a verdict in favor of plaintiff on the other two causes of action, awarding $108,000 for unseaworthiness and $29,776 for maintenance and cure. Upon defendant's motion, the trial judge reduced the latter award to $576. The trial judge denied defendant's other post-trial motions, for a new trial and for a judgment n.o.v. with respect to the unseaworthiness award, and this appeal followed.

Defendant's "central submission" on appeal is that "the trial judge was unable to fairly preside over this case by virtue of his bias against defendant's trial attorney, a bias derived not from any proceedings in connection with this case but from an earlier encounter in Milos v. Sea-Land Service," 478 F. Supp. 1019 (S.D.N.Y. 1979), aff'd, 622 F.2d 574 (2d Cir. 1980). Because of this "bias," defendant argues,

the trial judge should have recused himself from the case, pursuant to 28 U.S.C. §§ 455 (a),(b)(1), and he committed reversible error, requiring a new trial, by failing to do so.

At the outset, we note that defendant's principal argument has not been raised in a timely manner, as implicitly required by 28 U.S.C. § 455, see In re International Business Machines Corporations, 618 F.2d 923, 932 (2d Cir. 1980). Defendant attempts to excuse its tardiness by saying that it did not learn of the judge's "extrajudicial bias" -- referring to his "bias" based on the Milos "encounter" -- until the judge filed his opinion in the current case. This attempt is unpersuasive: it requires us to assume that defendant's trial attorney perceived bias in the trial judge's behavior, but could not connect his own recent, and assertedly

"bitter", encounter with the trial judge in the Milos case. Nevertheless, we feel that in order to dispel any doubt that defendant received a fair trial, we should decide defendant's "central submission" on the merits.

Even assuming, without deciding, that a bias developed by a trial judge against a trial attorney because of an encounter in a previous trial satisfies the "personal bias" requirement of 28 U.S.C. § 455(b)(1), we find no merit in defendant's argument of "extra-judicial bias." The trial judge ruled in favor of defendant in a number of matters; for example, in dismissing plaintiff's negligence cause of action, and in reducing the jury's award of $29,776 for maintenance and cure to $576. Defendant makes much of the trial judge's "reprimand" of defense counsel for his

failure to file a memorandum of law before trial, as directed. But the record shows that plaintiff's counsel was also strongly reprimanded for the same failure. Defendant also adverts to the trial judge's "intervention" during the testimony of plaintiff's expert medical witness; the argument here is that the trial judge "sponsor[ed] ... testimony favorable to plaintiff." But the record shows that the trial judge was simply clarifying the testimony of the witness. As for the trial judge's remark, in the jury's presence, instructing the court reporter to "Strike the insolence of counsel," defense counsel helped to bring this reproof upon himself. In sum, we find that defendant's charge of "bias" is not supported by the record.

The remaining issues raised by defendant are that the trial judge abused or failed to exercise his discretion

in denying defendant's post-trial motion for a new trial and in refusing to set aside or reduce the jury's award on ground of excessiveness, and that the trial judge's "verbose and confusing" charge to the jury constitutes error requiring a new trial. We have examined the record with respect to both issues, and find no reversible error.

The judgment of the district court is affirmed.

s/
WILFRED FEINBERG,
Chief Judge

s/
AMALYA L. KEARSE,
Circuit Judge

s/
DAVID N. EDELSTEIN,
District Judge

APPENDIX B

POST TRIAL OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEWART V. DIXON, :

Plaintiff, : 78 Civ. 5929

-against- : (IBC)

MARITIME OVERSEAS CORP., : [D.C. OPINION ON POST TRIAL MOTION UNDER F.R.CIV.P. RULES 50, 59]

Defendant. :

----------x

Plaintiff brought suit against defendant for injuries to his knee sustained on August 3, 1978 aboard defendant's ship while employed as an able-bodied seaman. On January 18, 1980 the jury rendered a verdict in favor of the plaintiff: $108,000 in damages for injuries to plaintiff on his claim of unseaworthiness; $29,776 for maintenance and cure. Defendant Maritime Overseas Corporation now moves for relief in two respects: (1) a new trial, pursuant to

Fed. R.Civ.P. 59, on the unseaworthiness cause of action and (2) for judgment notwithstanding the verdict, pursuant to Rule 50 of the Fed. R.Civ.P., for a new trial or remittitur with respect to maintenance and cure.

Maintenance and cure

In light of the two different causes of action dealt with here, it might be well to keep in mind the true purpose of maintenance and cure. "Maintenance and cure is a contractual form of compensation given by general maritime law to a seaman who falls ill while in the service of his vessel." Evans v. Blidberg Rothchild Co., 382 F.2d 637, 639 (4th Cir. 1967). It must be remembered that maintenance and cure is not a panacea; its objectives are limited. Farrell v. U.S., 336 U.S. 511, 519 (1949) puts it plainly:

> Maintenance and cure is not the only recourse of the injured seaman. In an appropriate case he may obtain indemnity or compensation for injury due to negligence or unseaworthiness and may recover, by trial before court and jury, damages for partial or total disability. But maintenance and cure is more certain if more limited in its benefits. It does not hold a ship to permanent liability for a pension, neither does it give a lump-sum payment to offset disability based on some conception of expectancy of life. (emphasis added)

The obligation to provide maintenance and cure ends at "the point where the maximum possible cure has been attained." M. Norris, The Law of Seaman §562 (3d ed. 1970) [hereinafter cited as Norris]; G. Gilmore & C. Black, The Law of Admiralty §6-10 (2d ed. 1975); Oliveras v. United States Lines Co., 318 F.2d 890, 893 (2d Cir. 1963); Brahms v. Moore-McCormack Lines, 133 F. Supp. 283, 285 (S.D.N.Y. 1955); See also Berke v. Lehigh Marine Disposal Corp., 435 F.2d 1073, 1076 n. 3; Vandinter v. American Steamship Co., 387

F. Supp. 989, 990 (W.D.N.Y. 1975); Norris §563.

Although awards for accrued maintenance and cure have been approved for periods as long as seven years (see Koslusky v. United States, 208 F.2d 957 (2d Cir. 1953)), a grant of prospective maintenance is only allowed for short periods of time which are definitely capable of ascertainment. The grant of a lump sum for an indefinite period is invalid. Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938); Campbell v. American Foreign S.S. Corp., 116 F.2d 926, 929 (2d Cir. 1941); Keiser v. American President Lines, Ltd., 384 F. Supp. 554, 555 (S.D.N.Y. 1974); Norris §567.

Plaintiff was injured on August 3, 1978; he was declared fit for duty and recommenced work on October 9, 1978. No claim was made for maintenance and cure

for this period because plaintiff had been paid. Plaintiff only claimed maintenance and cure from the time he was reinjured in his subsequent employment aboard the S.S. Virgo, on January 20, 1979, until April 2, 1979, when he was declared fit for duty.

The jury was charged that maintenance and cure runs only until the time when a "maximum cure" is reached, and this term was defined. It was explained that "This does not mean a complete cure has been effected. It means only that the plaintiff can recuperate no further from his injuries ...." Charge of Court, Transcript of January 14, 1980, p. 25 [hereinafter cited as Charge]. The jury was also charged that it "may find that it [maximum cure] has not yet been reached." (Charge at 26.) The jury was then instructed that in calculating the amount of the

maintenance and cure:

> Despite inflation or other factors, the union contract establishes the rate for payment of maintenance and cure at $8.00 a day. That is binding on the plaintiff. Thus, you may multiply this figure by the number of days that the plaintiff was due his maintenance and cure under the guidelines I have already given you.

Id.

Defendant contends that the maximum maintenance and cure that can be awarded is $8.00 a day for a period of 72 days (January 20, 1979 - April 2, 1979), or $576.00. Plaintiff agrees that he can only recover maintenance and cure for a period of "some 72 days." However, he argues that this number of days should be multiplied by $25.00. Therefore, plaintiff argues that "we are of the opinion that any remittitur should reduce the verdict on the maintenance award to no less than $1800," but he

adds that this would be "together with appropriate interest, and reserving all rights as to damages because of defendant's willful failure to pay maintenance and cure." Answering Affidavit of Max Cohen, Esq., filed Feb. 8, 1980, at ¶4.

The jury was charged to grant $8 per day until the point of maximum cure, which we believe was correctly defined.

We defined plaintiff's routine demand for counsel fees for the simple reason that the total trial record was completely barren of any evidence reflecting that the shipowner had been "callous in [its] attitude," "recalcitran[t]," or "willful and persistent" in failing to pay maintenance and cure, proof required for the granting of such relief. Vaughan v. Atkinson, 369 U.S. 527 (1962); Roberts v. S.S. Argentina, 359 F.2d 430 (2d Cir. 1966).

The granting of costs and interest also requires that circumstances had existed in which the defendant had been "callous and reckless in failing to recognize its continuing obligations to plaintiff, and that its action in cutting off payment of ... maintenance to plaintiff stemmed from a 'wanton and international' disregard of his rights as a seaman." Catrakis v. Nautilus Petroleum Carriers Corp., 427 F. Supp. 255, 260 (S.D.N.Y. 1977); Vandinter v. American Steamship Co., 387 F. Supp. 989, 990-91 (W.D.N.Y. 1975).

We hold that the jury award of $29,776 for maintenance and cure was grossly excessive. As a matter of law, we are compelled to reduce it to $576 ($8. for each of the 72 days claimed). The jury's verdict on this claim demonstrates, to this Court, the jury's

conviction that plaintiff's claim as to the extent of his injuries, their permanency, his pain and suffering, etc. had merit; this conviction accounts for and is reflected in the verdict on the unseaworthiness claim.

Under Fed. R.Civ.P. 50, the standard for granting a motion for judgment notwithstanding the verdict is the same as that for directing a verdict at the close of evidence. 9 Wright & Miller, Federal Practice and Procedure: Civil §§2534, 2537. Formulation of the standard by our Second Circuit is found in Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970): "Simply stated, it is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict

that reasonable men could have reached." Id. at 4.

Whereas the verdict is excessive, it does not warrant being set aside, rather, the verdict must be reduced.

Maintenance and cure:
remittitur is the remedy

The trial court is empowered to grant a new trial on all issues or on a particular issue to prevent a "miscarriage of justice" resulting from a jury verdict. Since the court has sole discretion over the granting of such a motion, it is a remedy which is not lightly employed. 11 Wright & Miller, Federal Practice and Procedure: Civil §2803. A jury verdict is not to be disregarded unless a prejudicial error occurs causing "substantial harm" to the losing party. Id.; Fed. R.Civ.P. 61. The drastic remedy of a new trial is not necessary in an instance such

as this where the excess of the award can be segregated from the valid portion.

When clearly excessive damages are awarded, the Court will use the procedural device of remittitur to reduce the damages awarded. The denial of the defendant's motion for a new trial is conditioned upon remission of the excess amount by the plaintiff. Comsikey v. Pennsylvania R.R. Co., 228 F.2d 687, 688 (2d Cir. 1956). Wright & Miller describe the procedure this way: "There is ... a practice, now sanctioned by long usage, by which the court may condition a denial of the motion for a new trial upon the filing by the plaintiff of a remittitur in a stated amount." 11 Wright & Miller, Federal Practice & Procedure: Civil §2815. A case, such as this, in which certain identifiable sums included in the verdict should not have been awarded to plaintiff clearly warrants the remedy of

remittitur. The filing of a remittitur by the plaintiff should be in the amount of the excess verdict. 11 Wright & Miller: Civil §2815. Clearly to be avoided is the delay and expense of a new trial.

Plaintiff would have us adopt the position that the per day allowance in this Circuit should be $25.00 rather than the standard $8.00. We rejected this position at trial. The growing burden of inflation, the high cost of living and the diminished value of money are factors about which we are not unsympathetic, however, our Circuit Court has fixed the daily rate for maintenance and cure at $8.00 and we feel so bound.

Since we find it abundantly clear that the maximum period of maintenance and cure herein is 72 days at the prevailing rate of $8.00 a day, plaintiff is directed to file a remittitur in the sum of $29,200; failure to do so will result in a retrial of that claim.

Verdict on unseaworthiness sound and not excessive

The totality of the trial record clearly supports the jury's verdict on the claim of unseaworthiness. The proceedings were not "tainted by prejudice," and the size of the verdict was fair, reasonable and by no means so excessive that it would be "unconscionable to let it stand." 11 Wright & Miller: Civil §§2803, 2807.

In terms of weighing the evidence presented at trial, the mere fact of conflicting evidence is not enough to trigger a new trial. Indeed, conflicting evidence is the basis of the adversary system of litigation, and it is the province of the jury alone to "pick and choose" among the items presented for its consideration. "[A] decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly

suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter." Id. at §2806. We again emphasize that we entertain no doubt as to the wisdom of the jury's verdict.

The defendant brands plaintiff's version of how the accident happened as a "physical impossibility." We find this without merit. The jury had evidence before it including the plaintiff's own extensive testimony about the extent of his injuries and the circumstances which produced it, also the corroborating evidence of an eyewitness, an able-bodied seaman, who testified that plaintiff's injury occurred in the manner plaintiff stated. There was also the testimony of plaintiff's expert medical witness, Dr. Seaman, that the accident, as described, was the "competent producing cause" of the knee

injury which he diagnosed.

We are faced then with a situation of conflicting allegations. It is clear that the jury chose to believe plaintiff's version of the incident. The jury was entrusted with the sworn duty to make judgments, predicated on facts the jury saw fit to adopt in accordance with the measure of proof prescribed by law. We must bear in mind that: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel other results are more reasonable." Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 110 (1959) (quoting Tennant v. Peoria & Perkins Union R. Co., 321 U.S. 29, 35).

Our estimate of the trial record here -- qualitatively and quantitatively -- leads us to the conclusion

that the jury's award was not excessive. The reasons given by this District Court for upholding the jury verdict in Grunenthal v. Long Island Rail Road Co., 292 F. Supp. 813 (S.D.N.Y. 1967), as explained and affirmed by the Supreme Court, are equally applicable here.

> The trial judge ... considered that in deciding the railroad's motion [for a new trial] he 'must indulge ... in a fairly accurate estimate of factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced.' He concluded that the motion should be denied because, applying that standard, the relevant evidence weighed heavily in favor of the jury's assessment .... The judge conceded that the aggregate award seemed generous, but he concluded nevertheless that it was 'not generous to a fault or outside the bounds of legal appropriateness.' .... [T]he trial judge did not abuse his discretion in finding 'nothing untoward, inordinate, unreasonable or outrageous -- nothing indicative of a runaway jury or one that lost its head.'

393 U.S. 156, 158-60 (1968). (See also 388 F.2d 480 (2d Cir. 1968.))

The language in our opinion on the motion for a new trial in Milos v. Sea-Land Service, Inc., 478 F. Supp. 1019 (S.D.N.Y. 1979), aff'd, No. 79-7743 (2d Cir. March 20, 1980), (Mr. Stearns was defense counsel in Milos also) is equally applicable here. "We are overwhelmingly convinced that the record here is replete, practically saturated, with factual questions, the resolution of which support the findings of the jury (which is not to say no other result was conceivable)." Id. at 1028.

The attack on the trial judge by the lawyer for defendant

We read with incredulity and distaste certain portions of the instant moving papers (affidavit of Joseph T. Stearns, verified Jan. 28, 1980) and memorandum in support thereof submitted on behalf of the defendant. We experienced the same reaction

upon reading Mr. Stearns' brief submitted in behalf of defendants-appellants (filed March 19, 1980) in the United States Court of Appeals for the Second Circuit (Docket No. 79-7743) in the case of Milos v. Sea-Land Service, Inc., No. 79-7743 (2d Cir. March 20, 1980), aff'g, 478 F. Supp. 1019 (S.D.N.Y. 1979). The trial in that case came on before us on June 5, 1979; Mr. Stearns was the trial lawyer; the jury returned a verdict of $360,000 in favor of plaintiff Milos for personal injuries he sustained while working aboard defendants' vessel. The abuse heaped upon us by Mr. Stearns is of the same caliber in both cases.

We find it relatively easy to dispose of the multitude of objections, raised in another part of the moving papers now before us, that are addressed to claimed errors of law committed by us during the

trial and charge to the jury. Many of them closely match the alleged grievances committed by us during trial and charge in the Milos case, and raised on appeal by Mr. Stearns. We are compelled to note that much that is there designated harmful, we regard as the pinnacle of nitpicking. We believe our rulings were correct at the time they were made and, after careful examination of the arguments presently advanced, adhere to them.

What we find irresponsible is the assertion now again repeated by Mr. Stearns of what he called our "misconduct." He again impugns to us an improper motive in putting questions to witnesses and making statements during trial -- i.e., that our objective was to elicit answers and make statements favorable to the plaintiff. We find it extremely difficult to contain the urge to tell Mr. Stearns "off." We

feel compelled, at the very least, to denounce this as not rising to the dignity of contempt. We shall do our utmost to cling exclusively to the facts and law here involved.

We sought only and exclusively to clarify the record, primarily for the benefit of the jury, especially during the testimony of medical experts -- often "heavy" and technical. It is true that on occasion our questions evoked answers that Mr. Stearns did not appreciate, but it is the jury, not alone the lawyers, that must clearly understand the total evidence in order to fulfill a sworn obligation to make a legal determination of the factual issues involved.

The law encourages questions put by the trial judge to clarify the trial record. A district judge need not play a passive role in the conduct of a jury trial.

The Second Circuit has stated that "[a] judge who conducts a jury trial has a duty to see that the facts are clearly presented and may ask pertinent questions of the witnesses to that end. He is not a mere passive spectator or moderator. . . ." Pariser v. City of New York, 146 F.2d 431, 433 (2d Cir. 1945). The judge may interpose relevant questions to witnesses "to clarify both legal and factual issues and thus minimize possible confusion in the jurors' minds." Anderson v. Great Lakes Dredge & Dock Co., 509 F.2d 1119, 1131 (2d Cir. 1979). A judge "is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert." United States v. Marzano, 149 F.2d 923, 925 (2d Cir. 1945) (Learned Hand, J.). "Federal judges are not referees at prize-fights but functionaries of justice."

Johnson v. United States, 333 U.S. 46, 54 (1948). The trial judge must, however, studiously avoid at all costs "tak[ing] on the role of a partisan." Marzano, supra, at 926. We determinedly avoided the breach of that prohibition, despite repeated insistence to the contrary and denouncement by Mr. Stearns. "A judge is not wholly at the mercy of counsel ...." Ballantine Books, Inc. v. Capital Distributing Co., 302 F.2d 17, 21 (2d Cir. 1962).

> He [the judge] sits to see that justice is done in the cases heard before him; and it is his duty to see what a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other .... The Judge is the only disinterested lawyer connected with the proceeding. He has no interest except to see that justice is

> done, and he has no more important duty than to see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury. (emphasis added)

Simon v. United States, 123 F.2d 80, 83 (4th Cir.), cert. denied 314 U.S. 694 (1941).

We explained the essense of the following to the jury in the early part of our charge (See Charge at 10):

> [U]nlike judges in many of our state courts, a federal judge may comment outright on any portion of the evidence, telling the jury how it struck him, whom he believed, or disbelieved, and the like, provided only that he advises the jury that they are in no way bound by his expressions of such views. (emphasis added)

United States v. Rosenberg, 195 F.2d 583, 594 (2d Cir. 1952).

Encouragement to ask questions of witnesses during trial also has come to us quite frequently over these many years from juries who, after the rendition of

verdict in civil or criminal cases, ask "to call on the judge." Almost invariably they express their warm approval and state that "you made it so simple for us to understand. Why did that lawyer and some witnesses talk in such highfalutin terms?" In effect, their comments are the same in respect to the court's charge. After entering upon their deliberations, we hardly ever get a note from the jury asking for clarification. Our objective is that <u>each</u> juror, not the "smart" ones alone, understand the law's instructions, to the end that <u>each</u> juror will be in a position to actively participate in the rendition of a just verdict -- not just blindly follow a "leader." This process of simplification takes much time and lots of energy. We go on doing it fully aware that some lawyers find it "verbose," etc., etc.

We regard it totally baseless for the lawyer to allege in his affidavit and memorandum, among seemingly endless objections, that: (1) The Court conducted the trial in a manner which displayed an adoption of the plaintiff's claim, acting as an advocate in his behalf. This was accomplished by (i) prevention of Mr. Stearns from pursuing his line of questioning of Dr. Seaman by cutting the lawyer off; (ii) explaining away inconsistencies; (iii) showing a high regard for Dr. Seaman's testimony. (2) The Court was openly hostile toward Mr. Stearns, which may have led the jury to believe that the Court was hostile to the defendant's position. (3) The Court's behavior at trial was tantamount to judicial misconduct -- the same charge lodged in the Milos case.

Mr. Stearns' repetitive charges of judicial intervention, partisanship, erroneous

charges, etc., in this matter, and in the Milos case, reflect the arid wasteland of his arguments. He seems to feel that the application of a little ink and rhetoric will bring forth flower in the desert. No healthy growth can come from these infertile seeds, nor shall we assist in the inception of infirm ideas. When you don't have either the facts or the law on your side, you make an ad hominem attack.

So it was said by Mr. Stearns, for example, in the Milos case: "The District Court's verbose, erroneous, and contradictory charge, and interrogation of jurors and witnesses constituted misconduct ...." Brief of Defendant-Appellants at 42. "The district court's approach to the all-important issue of the medical aspects of plaintiff's thumb condition was similarly one-sided in favor of plaintiff." Id. at 46. "[T]he district court,

apparently in anticipation of this problem in plaintiff's case, offered its own exonerating hypothesis that completely explained and excused plaintiff's sudden memory lapse." Id.[1]

The extensive list of what he regards as outrageous in the instant case, essentially the same as was emphasized by him in Milos (though even considerably more egregious in that case), was filed by Mr. Stearns before our Circuit Court of Appeals decided the Milos appeal. It should be borne in mind that the moving papers before us now were filed on January 28, 1980; his

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1 There were quite a few other such comments in the same appellate brief, including, that there was "intimidating interrogation of the prospective jurors." Brief of Defendants-Appellants at 45. "[I]n this district court's view, humility is synonomous with docility." Id. at 43. [I]t was forcefully impressed upon them [the jury] that such docility (or 'humility') was required if they were to properly discharge their duty." Id. at 47. "[T]he court diverted attention." Id.

brief on appeal in Milos was filed March 19, 1980. Mr. Stearns felt safe in using the same line of attack. However, on March 20, 1980 the United States Court of Appeals for the Second Circuit affirmed our judgment in Milos holding:

> We find no reason to overturn the jury verdict for the plaintiff. The district court did not err in its charge to the jury concerning the proper standard for awarding damages. The charge sufficiently instructed the jury that damages should be awarded to plaintiff only to the extent that his fall resulted in additional harm to his arthritic thumb. The court's charge on defendants' liability for damages caused by their "slightest" negligence was also proper.
>
> Defendants' contentions that judicial misconduct and errors in the admission of medical testimony constituted reversible error are also without merit.

Mr. Stearns expresses outrage because we called him, in the jury's presence, "insolen[t]." He was, indeed. He neglects

to reveal what he said to the Court to engender our uncomplimentary remark:[2] upon the Court's asking a question during cross-examination of the plaintiff's medical expert,[3] the following ensued: MR. STEARNS: "I say it's improper. THE COURT: Do you? That is your notion. Strike the insolence of counsel. Next question." Transcript of Jan. 8, 1980 at 84. What this trial lawyer also fails to reveal is that his comment was

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2 Mr. Stearns states only the following in his Memorandum of Law: "That interjection [question put to Dr. Seaman] further prompted the exchange which follows, on pages 84 through 86 of the transcript, in which defendant's counsel's invited exception to the Court's comment was characterized by the trial judge as 'insolence' ...." Defendant's Memorandum of Law at 8.

3 We said to Dr. Seaman during his cross-examination: "There come a time when I have to charge the jury on the law and I have to know what the facts are in order to be able to sensibly charge the jury as to the law," Transcript of Jan. 8, 1980 at 87, in explanation of why we were persistent in obtaining his answers to our questions. Needless to add, this extract is also not mentioned by Mr. Stearns.

uttered belligerently, his facial expression recorded contempt, his movements depicted disdain for the trial judge -- an attitude he displayed on a few occasions before and during the trial.

Trial attorneys have a perfect right to interpose objections to a trial judge's questions, to advance reasons therefor and to make proper comment with respect thereto. All this is easily and fully accomplished by the use of proper language in a respectful manner (even when the attorney firmly believes the judge has erred grievously). This is especially imperative when the jury is present. The attorney must never forget that at all times he has a dual role; he is an officer of the Court as well as an attorney for his client. The disrespectful approach is bound to bring on judicial retort if the jury is not to be "lost" -- i.e., if its members are (or even one is)

made to look upon the judge as "weak," they are very likely to pay little attention (even without disclosure) to the law charged by an infirm judicial officer, one for whom they have lost respect.

It comes as no surprise to us when, on occasion, jurors who, after the rendition of verdict stay to talk with us, comment: "That lawyer was fresh. We're glad you didn't take it from him and showed him who's running the Court."

Because Mr. Stearns tirelessly inveighs against us and repeatedly accuses the Court of invading the province of the jury, we are constrained to set out the pertinent portions of the charge which conclusively show that we made the jury profoundly aware that they, not the Judge, were the triers of fact.

[T]he one and only factor that you are exclusively bound by under oath [is] the facts, as you, the jury, find them to be, and the law applicable to those facts.

....

[T]he only triumph in any litigation, whether its nature be civil or criminal, is the triumph of the truth. Neither you nor I are here to please anybody .... We have a sworn duty to perform and must discharge it with honor, if justice is to prevail.

....

[You are equipped] with an education in life, and that is what you bring into the jury box, that all-important decision-making power which constitutes a great and powerful arm of the law.[4]

....

That is where your function come in, to pick out what is meaningful or convincing to you. As I so often tell jurors, when you walk into a courtroom and are selected for jury duty, you do not leave your common sense outside.[5]

...

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4 Charge at 3-4.

5 Id. at 7.

> Under our system of justice, the Court and the jury have distinct and separate functions to perform, each independent of the other to a large degree....
>
> I am not going to decide the facts, neither are counsel. That is exclusively your sworn obligation. It is your burden. You have to decide where truth lies. I will not let anyone interfere with your function. You and only you -- not the Judge, not the attorneys -- are the sole and exclusive judges of the facts, and that is your paramount duty. I repeated that several times during the course of your selection.
>
> You and only you -- not the Judge, not the lawyers -- determine the weight of the evidence. You and you alone determine the believability of each witness, and only the jury can resolve such conflicts as there may be in the evidence. It is my function to instruct you as to the law with respect to the claims here asserted. Each proposition of law that I give you must, and I emphasize must -- not may, must be applied to the factual situation to which it relates.[6]
>
> ....
>
> [A] federal trial Judge has the power to comment on the evidence.... I have the power to tell you my impression

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6 Id. at 8-9.

of every one of the witnesses who testified [unlike in the State Court]. I have the power to comment on the weight that I believe a document here and there should be given. I can express my doubt as to any phase of the total trial record. I can say at trial that this one falsified or that I would not believe that one on a stack of Bibles.... [o]r as to another witness, that he spoke the gospel truth, so long as I say "But you are the judges of the facts."

I have never done that in any case over which I have presided.... I am quite confident I never shall, for the simple reason that I refuse to believe that if I were to give you my estimate of the evidence on this point or that point, that you would not be impressed by it, at least one of you, if not more, and I do not want to invade your orbit of factfinding.

So, since I have a perfect right to comment on the evidence if I chose to do it, and I am not doing it, I do not want you, and I forbid you, from reading into the tone of my voice, or the emphasis that I put on one proposition or another proposition of law, as to how I feel about the facts. If I wanted to tell you, I would tell you right out, because the law gives me the power to do exactly that.

I do not sit as a judge and then turn my head away at something that is unacceptable to me, or make some facial expression which shows my disbelief. There are a hundred ways that that can be done.

That is unbecoming and an unwarranted thrust at the laudable objectives of the law....

[W]hen you have a perfect right to go up the front way, you go up that way, you do not go sneaking around the back. So, if I wanted to tell you my impression of the facts, I would go right up the front way.[7]

Under our system, then, you, as American ministers of justice, must always bear in mind that each one of these litigants is entitled to even-handed justice. They stand equal before you. You must not allow sympathy or bias or prejudice to play any part whatsoever in your determination of the case....

You swore, and that is what I exacted from each one of you, that that is exactly what you would do: that you would predicate your verdict exclusively on the facts and on the law.[8]

The fact that I charge you in regard to damage does not mean to infer for a moment that I'm saying you should find damages. That is entirely up to you.[9]

You apply such criteria [common sense] as you sum up the imprssions of any witness who took the stand before you, and that includes the doctors. You do the assessing, and that is up to you all the way down the line.

---

7 Id. at 10-11.

8 Id. at 14-15.

9 Id. at 47.

....

So all I can beseech you to do ... in regard to your obligation, among other things, is to assess the testimony. All I can do is beseech you to ponder and to reflect on possible inconsistencies in the testimony of the witnesses which may or may not cause the jury to discredit testimony.[10]

....

What weight is to be given it [any deposition read] is entirely within your province.

....

The case is being submitted to you with the confidence on the part of the Court that the oath of office that you took as jurors to fairly and impartially pass upon the evidence will be faithfully observed.[11]

....

And so, Mr. Foreman, ladies and gentlemen of the jury, you, as the judges of the facts, must stand up for your convictions as you argue among yourselves, in order to do justice .... Discuss and weigh your respective opinions dispassionately,

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10 Id. at 58.

11 Id. at 63-64.

without regard to prejudice, favor, bias for either side, and adopt that conclusion which in your good common sense, and under your oath, appears to be in accordance with the truth....

So you adopt the factual conclusions that seem proper, if you can do so without violence to your own individual judgment, and apply that high degree of genuine courage that you justly expect from your public officials, especially in these perilous times.

....

I commend you to the faithful performance of your sworn duty. Putting that in simple language, that is without fear or favor to any man, you are to well and truly try the issues in this case between this plaintiff and this defendant according to the evidence presented to you in open court and under the applicable law as stated to you by the Court. I point out to you, with all the emphasis that I can summon, that in your deliberations in the jury room there can be absolutely no triumph either for the spirit or the letter of justice except in the ascertainment, the declaration, the pronouncement of the truth as you find it to be.

That really, in essence, is your mission.... [12]

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12 Id. at 65-66.

Conclusion

The applications for judgment notwithstanding the verdict or a new trial on the isue of maintenance and cure and for a new trial on the issue of seaworthiness are denied. With respect to the claim for maintenance and cure, we direct plaintiff to file, within fifteen (15) days of the filing of this order, a remittitur in the sum of twenty-nine thousand two hundred dollars ($29,200); otherwise the issue of maintenance and cure shall be retried. All other motions for further relief, addressed to the total trial record and verdict, are denied.

SO ORDERED:

New York, N.Y.
April 23, 1980

UNITED STATES DISTRICT JUDGE

APPENDIX C

DENIAL BY COURT OF APPEALS OF PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

C-1

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of March, one thousand nine hundred and eighty-one.

----------x

STWEART V. DIXON,

Plaintiff-Appellee-Cross-Appellant,

v. No. 80-7408
80-7456

MARITIME OVERSEAS CORPORATION,

Defendant-Appellant-Cross-Appellee.

----------x

[STAMPED: UNITED STATES COURT OF APPEALS, FILED, MAR 16 1981, A. DANIEL FUSARO, CLERK]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant-cross-appellee, Maritime Overseas Corporation.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing be DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro,
Clerk

APPENDIX D

JUDGMENT

D-1

Cooper, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
STEWART V. DIXON,

Plaintiff,

-against-

MARITIME OVERSEAS CORP.

Defendant
----------x

[STAMPED: U.S. DISTRICT COURT, FILED, JAN. 18 1980 S.D. OF N.Y.]

78 Civil 5929 (IBC)

JUDGMENT

[handwritten: #80,0069]

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Irving Ben Cooper, United States District Judge, and a jury, on January 7,8,9,10,14 and 15, 1980, and defendant having moved to dismiss the negligence cause of action, and the Court having granted the said motion, and at the conclusion of the evidence the Court having submitted the attached special questions to the jury, and the jury having answered the said questions, and the jury in so doing having returned a verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff STEWART V. DIXON have judgment against defendant MARITIME OVERSEAS CORP., in the amount of $137,776., and it is further,

ORDERED, ADJUDGED and DECREED: That the negligence cause of action be and it is hereby dismissed.

Dated: New York, N.Y.
January 17, 1980

s/Raymond F. Burghardt
Clerk 1/18/80

A P P R O V E D:

s/Irving Ben Cooper
U.S.D.J.

[handwritten:

3/27/80 - Bill of Costs as taxed in the sum of $888.45., in favor of plaintiff, as against defendant, and added to the judgment.]

[s]Raymond F. Burghardt
Clerk

APPENDIX E

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL, JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR REMITTITUR OF CERTAIN PORTION OF THE MAINTENANCE AND CURE VERDICT RENDERED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEWART V. DIXON, 78 Civ. 5929 (IBC)

Plaintiff,

-against- AFFIDAVIT

MARITIME OVERSEAS CORPORATION,

Defendant.

----------x

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I an an attorney-at-law and member Walker & Corsa, attorneys for defendant herein and submit this affidavit in support of defendant's motion for new trial, judgment notwithstanding the verdict and/or remittitur of certain portion of the maintenance and cure verdict rendered.

2. This is a seaman's personal injury case wherein plaintiff claimed to have been injured aboard defendant's vessel SS OVERSEAS OHIO on August 3, 1978 while, in the course of his duties as an abled bodied seaman, was struck in the left knee with the handle of a tank cleaning ("butterworthing") machine.

3. Trial was had before Honorable Irving Ben Cooper, United States District Judge, and a jury on January 7, 8, 9, 10 and 15, 1980, resulting in a jury verdict in favor of plaintiff, (a) on the issue of unseaworthiness in the amount of $108,000.00 and (b) on the maintenance and cure claim in the amount of $29,776.00 for a total verdict of $137,776.00. Plaintiff's negligence cause of action was dismissed, on defendant's motion, on January 9, 1980. Judgment was entered in plaintiff's favor in the amount of $137,776.00 on January 18, 1980.

4. It is defendant's position that the maintenance and cure award is fully without basis. Plaintiff claims to have been injured on August 3, 1978 and was disabled until October 9, 1978 when he was declared fit for duty and recommenced his maritime career. No claim was made for maintenance and cure payments arising during this period of alleged disability as plaintiff had been paid his maintenance and cure by defendant for this period. After sailing aboard the S/T VIRGO, plaintiff claims recurrence of knee pain and was declared not fit for duty on January 20, 1979. He was thereafter declared fit for duty on April 2, 1979 -- seventy-two days later. It was this seventy-two day period of alleged entitlement to maintenance and cure payments that was claimed, tried and charged to the jury.

5. The court, in its charge to the jury directed that $8.00 per day was the applicable maintenance and cure payment.

6. The jury appears to have followed the court's $8.00 per day direction and agreed with plaintiff's claim of entitlement to payments for a period of seventy-two days, for a total of $576.00. The jury went further, however. In the spirit of compensation, the jury rendered a maintenance and cure verdict in the amount of $29,776.00 which, divided by the $8.00 per day, represented an award of ten years, seventy-two days. The award, insofar as it represents maintenance and cure for seventy-two days, is understandable. But as the only period of disability for which maintenance and cure was arguably available and an award for maintenance and cure for any period

beyond the seventy-two days (especially, as here, a fully unsupportable ten year award) has no foundation whatsoever in the record and must be overturned. As the court charged the jury plaintiff was fit for duty at the time of trial and had been since November 1979. In addition damages in the form of counsel fees for refusing to pay were not claimed.

6. The runaway ten-year aspect of the maintenance and cure award appears subject to easy remedy by the court through granting judgment notwithstanding the verdict, as the dividing line between the supportable and unsupportable portions of the verdict is distinguishable.

7. However, the excessiveness of the maintenance and cure award reflects a more fundamental misunderstanding on the part of the jury and brings into question

their understanding of the court's charge some two hours and forty minutes in length. The damage award was similarly excessive.

8. In this case, which involved no issue of negligence, or contributory negligence, and where the sole issue in the suit for damages was the believeability of the plaintiff, the court nonetheless charged the jury on every conceivable legal point raised by the evidence in verbose instructions which took approximately two hours and forty minutes to deliver. In his charge the court erroneous described the test of causal connection between the alleged unseaworthy condition and the occurrence of injury to plaintiff as identical to the standard of causation in Jones Act cases. That is, the court charged in this case of unseaworthiness "even the slightest" as the test of connection between an unsafe condition and injury to plaintiff. In

addition the court charged "maximum medical cure" on the issue of maintenance and cure and did so inappropriately, since as the court observed in its charge the plaintiff was fit for duty at the time of trial and had been since November 1979. Moreover the court elaborately charged the jury on plaintiff's claim for lost future wages despite scant or absent evidence in support of any such claim offered during trial by plaintiff. In fact, the attorney for plaintiff during his summation, apparently bereft of further inspiration on the damage issue, simply asked the jury to pay attention to the court's charge on the issue. Moreover during the trial the court on numerous occasions interfered with the cross examination of plaintiff's medical expert, Dr. George Seaman and reminded the jury of Dr. Seaman's opinion that plaintiff's alleged permanent condition was "in its early

stages" during cross examination of defendant's doctor, Vincent Lodico, M.D. Most particularly, throughout the cross examination of Dr. Seaman the court intervened in a way suggesting to the jury the court's confidence in the doctor's opinion.

9. Dr. Seaman's opinion was unsupported by any similar diagnosis found anywhere in any records relating to plaintiff's treatment and/or observation over a period of in excess of one year after the occurrence of the accident in suit. No other doctor, despite numerous x-rays and the fact that an arthrogram was performed, made a diagnosis either of patella fracture or chondromalacia. Dr. Seaman's contrary testimony was, accordingly, entirely against the weight of the objective medical opinion expressed by doctors unconnected with this litigation. In the fifteen months between the occurrence of

the injury and early November 1979 when plaintiff was last seen at the Public Health, Staten Island, he was examined on numerous occasions by doctors, including numerous orthopedists. Plaintiff in the aftermath of this accident was repeated declared fit for duty by Public Health Service doctors. Dr. Seaman, of course, never said that plaintiff was unfit for duty but merely speculated concerning the progress of the alleged underlying chondromalacia. In addition, plaintiff's description of how his accident occurred was contrary to known physical principals. Despite the fact that plaintiff was admitted pulling backwards on the handle just before it broke when it allegedly came away in his hand he fell <u>forward</u> towards the reel and into the path of the "free-wheeling" stub. This explanation was

necessary to account for the fact that the plaintiff's stance in addressing the reel was sufficient to permit the full length of the handle to clear his knees while the much shorter stub supposedly twice struck him on the knee. Plaintiff in fact described a physical impossibility in accounting for how his injury occurred.

10. It would seem that the court's protracted and verbose charge erroneously describing the standard of proximate causation in a unseaworthiness case and improperly instructing the jury to consider the question of maximum cure played a decisive role, when coupled with the obvious antagonism of the court for defendant's counsel, in achieving the result reached by the jury in this case. As the court is aware the attorney for defendant was accused of dishonesty following which a mis-trial application by

the defendant was denied. This application was renewed, again unsuccessfully, after the court's improper interference during cross examination of Dr. Seaman.

JOSEPH T. STEARNS

Sworn to before me this
28th day of Janaury, 1980.

s/ Ellen Gallagher
Notary Public

APPENDIX F

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR RE-ARGUMENT, AFTER PARTIAL DENIAL OF DEFENDANT'S POST TRIAL MOTIONS AND FOR AN ORDER RELEASING THOSE PORTIONS OF TRIAL TRANSCRIPT WHICH WERE NOT TO BE REPRODUCED WITHOUT THE COURT'S PERMISSION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEWART V.DIXON, 78 Civ. 5929 (IBC)

Plaintiff,

-against- AFFIDAVIT

MARITIME OVERSEAS CORP.,

Defendant.

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of Walker & Corsa, attorneys for defendant herein. I submit this affidavit in support of: (1) defendant's motion for reargument from the court's partial denial, by order dated April 23, 1980, of defendant's post-trial motions brought pursuant to Rules 50 and 59 F.R.Civ.P. and, (2) for an order releasing

those portions of the trial transcript which the court reporter was directed not to reproduce without the court's permission.

2. In its opinion of April 23, 1980 the court devoted nearly 14 pages of its 25 page opinion to dealing with an issue described by the court as: "[t]he attack on the trial judge by the lawyer for defendant." In the very first paragraph dealing with this alleged issue the court referred to the trial in the case of Milos v. Sea-Land Service, Inc. (So. District Index No. 78 Civ. 1848 (IBC)); (United States Court of Appeals, Second Circuit docket No. 79-7143), 478 F. Supp. 1019 (SDNY 1978), affirmed __ F.2d ____ (March 20, 1980). At page 11 of the court's opinion of April 23, 1980 the court stated:

> We read with incredibility and distaste certain portions of the instant moving papers (affidavit of Joseph T. Stearns, verified January 28, 1980) and memorandum in support thereof submitted on behalf of the defendant. We experienced the same reaction upon reading Mr. Stearns' brief (submitted in behalf of defendants-appellants (filed March 19, 1980) .... in the case of Milos v. Sea-Land Service, Inc. (emphasis added).

2. Quite correctly, the court indicates that trial in the Milos case began June 5, 1979 and resulted in a verdict for plaintiff in the sum of $360,000 and that defendants-appellants' brief in that case was not filed until March 19, 1980. The trial in the case at bar began in January, 1980, prior to the filing of the defendants-appellants' Milos appellate brief. Incorrectly, the court suggests that counsel for defendant "felt safe" in using the "same line of attack" in the Milos appeal as allegedly employed in the within motion. The "same line of attack,"

if that were a correct characterization, was raised in the Milos post-trial motion. Because of the court's confession of the "same" reaction of "incredibility" and "distaste" as experienced reading the papers in support of post-trial motion in this case as felt reading the Milos brief filed March 19, 1980 (i.e. after commencement of trial in the case at bar) it is vital to compare the allegations of judicial misconduct made in the Milos post-trial motion with those made in the Milos appellate brief; and with the allegation made in support of the motion from which defendant now seeks reargument. This for the obvious reason that the post trial motion in Milos was made June 20, 1979, long before the beginning of trial in this case. In light of the court's statements regarding its reaction to the Milos brief on appeal,

it will become apparent that the court must have harbored the same feeling toward "Mr. Stearns" at the time this trial began as expressed in the opinion of April 23, 1980; no hint of which appears, however, in the court's opinion of September 25, 1979 denying the Milos post-trial motion. See 478 F. Supp. 1019.

3. In Milos, in the affidavit of Joseph T. Stearns, sworn to June 20, 1979, defendant, in its motion for a new trial, alleged that the court improperly interrogated the jury during selection, stating as follows:

> 22. Defendant objects to the conduct of the trial in other respects beginning with the court's improper interrogation of the jury. The reaction to the court's questioning of the original juror No. 1, Robert Peacock, was utterly inappropriate. At no time did this juror suggest disrespect to the court and always seemed earnestly if not despairingly trying to understand the court's questions, and to fully and intelligently respond. He

showed no lack of "humility" although it is not understood that "humility" is a quality required of a federal court juror. That he was a middle-class, middle-aged black citizen made the court's conduct particularly inappropriate. By, without cause, discharging this juror, the court granted plaintiff an additional pre-emptory challenge if not two in light of the adverse reaction of the second juror occupying seat No. 2, Richard Brown. As plaintiff's counsel said "off the record" but at the side bar, in agreeing with the court's suggestion that Juror No. 1 be excused, "why should I have to use one of my three challenges." Defendant also objects to the treatment of Juror No. 6 Phyllis Klein, who the court believed had by facial expression or gesture expressed resentment, or whatever. (Affidavit in support of new trial in Milos, pp. 22-23.)

On appeal, defendant again stated this contention:

(b) The District Court's Interrogation of Prospective Jurors and of Witnesses.

The District Court's interrogation of the prospective jurors in this case, particularly the court's interrogation of Prospective Juror No. 1, Robert Peacock, constituted an abuse of its discretion and seriously compromised the independence of the jury.

Mr. Peacock was excused by the District Court following an exchange in which the court characterized Mr. Peacock's soft-spoken responses as "fresh" and, subsequently, as an indication that Mr. Peacock lacked "humility." The court's treatment of Mr. Peacock became the subject of unfavorable comment by two subsequent prospective jurors, Elmer Knox and Angela Randazzo, both of whom expressed dismay at the "harsh" manner in which Mr. Peacock was treated. The court's response to their comments was defensive and belligerent, resulting in the exclusion of Mr. Knox as juror.

A district judge is customarily granted broad discretion in directing the process of jury selection; but this discretion is necessarily circumscribed by the duty to act fairly and without capriciousness in the same way that the judge's privilege of commenting on the facts is to be exercised - "in conformity with the standard governing the judicial office." Quercia v. United States, 289 U.S. 466 at p. 470 (1932). In the case of jury selection, 28 U.S.C. §1863(a) provides a specific standard:

> "A district judge for good cause may excuse or exclude from jury service any person called and a juror."

It is submitted that the district court's conduct in the case at bar was neither in conformity with acceptable

> judicial standards nor in accord with the prescription of §1863(a). Moreover, the hostile response of the court to criticism of its treatment of Mr. Peacock by subsequent prospective jurors indicates that, in this district court's view, humility is synonomous with docility. Indeed, the entire thrust of the court's remarks to the prospective jurors was that, in order to properly serve on the jury, they must be in agreement with everything the district court had said or might say, whether it related to the case or not. (Brief of Defendants-Appellants' in Milos, at pp. 43-44).

4. In Milos with respect to the claim of the court's interference, defendant said in its attorney's June 20, 1979 post-trial motion affidavit:

> 3. Plaintiff injured the back of his right elbow, according to his testimony, and may have fallen on his back and shoulder area, according to the records of the physical therapist who treated plaintiff in June and July 1975. He fell over to his right; his upper body fell to this right, yet plaintiff testified that he thought that he might have struck and injured his right thumb against the "bulkhead" which was, however, on his left. Plaintiff never clearly explained the dynamics of his fall or how it was possible in a simple slip and

> fall accident to injure simultaneously his thumb and the back of his elbow and shoulder. He was not required to; on redirect, or during cross-examination, the court suggested in questions put to plaintiff that the accident had happened "too fast" and that, understandably, plaintiff could not recall how the thumb injury occurred. The "explanation" for the riddle of the simultaneous injury described was a major matter of attention by both parties in summation. (Affidavit of Joseph T. Stearns, p. 2).

In Milos in its Memorandum of Law in support of its new trial motion (which was also filed June 20, 1979) defendant asserted:

> Midsconduct by the court or counsel is a basis for a new trial. See, generally, Moore's Federal Prac., 2nd Ed. 1974 Vol. 6A, §59.08[2], and cases cited therein.
>
> The rule in circuit with respect to the permissable end the court's interrogation of the witness is found in Parisei v. The City of New York, 146 F.2d 431 (2 Cir. 1945) where at p. 433 the court stated:
>
> > "A judge who conducts a jury trial has a duty to see that the facts are clearly presented and may ask pertinent questions of the witnesses to that end. He is not a mere passive spectator or moderator, though it goes without saying he should exer-

> cise self-restraint and preserve an atmosphere of impartiality and detachment." See also, DeBello v. Rederei A/B Svenska Lloyd, 371 F.2d 559, 561 (2 Cir. 1967).

At trial the court intervened at a crucial juncture and by leading questions to the plaintiff, over defendant's objections, suggested that the accident had happened "too fast" for plaintiff to explain the dynamics of his fall, and how it could be that he injured the back of his right elbow and his right thumb. As mentioned in the moving affidavit, plaintiff testified that he was near the elevator bulkhead which was to his left when he slipped, and that he had fallen to his right and on his back. The attorney for plaintiff spent considerable time in summation on this issue. It was, indeed, a crucial issue, where the principal point of controversy was whether plaintiff had injured his thumb at all in the alleged accident. It was on this point, and in apparently sponsoring some of the controversial testimony of plaintiff's key medical witness, Dr. Bouton, that the court intervened. To suggest an excuse to plaintiff for his inability to explain the mechanics of his fall is not to ask pertinent questions to see the crucial issue clearly present. It was crucial error and alone sufficient basis for a new trial.

> Similarly, the unreasonable questioning of the excused juror, Peacock and, later, Juror No. 6 Phyllis Klein is inexcusable. Its effect on the outcome is incalcuable. (Milos Memorandum of Law June 20, 1979, pp. 44-45).

In Milos defendant also said in its June 20, 1979 affidavit:

> 23. Defendant also objects, and did at trial, to the court's interrogation of the plaintiff in a fashion resulting in excusing his inability to explain how his alleged thumb injury had occurred as he fell to his right away from the bulkhead which his thumb allegedly struck, as he landed on the steel deck on his back and injured the point of his elbow. Defendant also objects, and did so at trial, to ... the comment regarding Congress' intervention to cure former abuses of seaman which was inflamatory and prejudicial to defendant ... Defendant objects to the piece meal taking of testimony of plaintiff whose examination and cross-examination was interrupted time and again for the taking of other witnesses' testimony. This has the result, of course, of allowing plaintiff to supply connection to accommodate maters testified to by experts subject to connection. (Affidavit of June 20, 1979, pp.).

On appeal, defendant again contended such intervention by the trial court was error:

The serious prejudice to defendants resulting from the courts argumentative and intinidating interrogation of the prospective jurors can only be appreciated incontext of the court's subsequent intervention in the interrogation of witnesses. Of particular significance was the court's "explanation" offered to account for the discrepancies and weaknesses in plaintiff's testimony on the issue of whether he had injured his right thumb at all in the shipboard accident... The issue of how plaintiff fell was effectively taken out of the case by the explanation offered by Judge Cooper, although because it was a vital issue plaintiff's attorney returned to it in summation, adopting the court's explanation ... Instead of permitting the jury to assess for itself the implications of plaintiff's suddenly poor recollection, the district court, apparently in anticipation of this problem in plaintiff's case, offered its own exonerating hypothesis that completely explained and excused plaintiff's sudden memory lapse.

The deduction made by the district court in the case at bar to "explain" plaintiff's memory lapse was precisely the sort of unwarranted intervention inveighed against by the Supreme Court....

The district court's approach to the all-important issue of the medical aspects of plaintiff's thumb condition was similarly one-sided in favor of plaintiff. The court repeatedly asked plaintiff's medical witnesses to amplify and told the doctors to physically

demonstrate to the jury the extent of plaintiff's disability. But the court neglected to press these individuals regarding the basis of their opinion that there was a causal connection between plaintiff's accident and the condition of his thumb. By concentrating the jury's attention on plaintiff's "condition" the court diverted attention from what can only be termed a most tenuous connection between that condition and the alleged shipboard injury.

... The effect of the district court's comments in regard to "explaining" plaintiff's inadequate testimony and in focusing the jury's attention on the condition of his thumb rather than on how it came to be that way, was particularly harmful to defendants in view of the court's conduct during the jury selection process. As we have shown, this jury was selected on the basis of unquestioning obedience to and agreement with the conduct of the district court and it was forcefully impressed upon them that such docility (or "humility") was required if they were to properly discharge their duty. In light of the emotional intensity generated during jury selection and the court's emphasis on obedience, <u>any</u> suggestion by the court of partiality to one or the other side would have had the obvious effect of what occurred in this case. (Brief of defendants-appellants, pp. 45-47).

5. Although improper interference was alleged in Dixon, the court nevertheless criticized this allegation not on its merits but by reference to the Milos case:

> Mr. Stearns' repetitive charges of judicial intervention, partisanship, erroneous charges, etc., in this matter, and in the Milos case, reflect the arid wasteland of his arguments. He seems to feel that the application of a little ink and rhetoric will bring forth flower in the desert. No healthy growth can come from these infertile seeds, nor shall we assist in the inception of infirm ideas. When you don't have either the facts or the law on your side, you make an ad hominem attack.
>
> So it was said by Mr. Stearns, for example, in the Milos case: "The District Court's verbose, erroneous, and contradictory charge, and interrogation of jurors and witnesses constituted misconduct...." (Brief of Defendant-Appellant, at 42; Dixon at 16.)

6. The sole response to defendant's objection to the conduct of the trial in the case at bar has to do with the court's justification for calling "Mr. Stearns"

insolen[t]". (Opinion April 23, 1980 p. 18). The court (Id.) says that counsel "neglect[ed] to reveal what he said to the [c]ourt to engender our uncomplimentary remark" and that "(at 18-19) this trial lawyer fails to reveal is that his comment was uttered belligerently, his facial expression recorded contempt, his movements depicted distain for the trial judge - an attitude he displayed on a few occasions before and during the trial."

7. We are obliged to regrettfully note our view that the court's recollection of counsel's demeanor is incorrect.

8. The "few occasions before ..." the trial to which the court refers will undoubtedly be reflected in the part of the record containing the discussion among court and counsel, should it be assumed and such "occasions" happened.

For this reason and because the court's "distaste" for defendant's counsel affected the trial of this case, this portion of the record must be released so as to be included in the record on appeal.

9. It is apparent that the court was "of a bent of mind," within Judge Friendly's definition of the proper basis for recusal found in Rosen v. Sugarman, 357 F.2d 794 (1966). This court should never have tried this case, and the first mistrial application which was made before jury selection should have been granted. It should now grant a new trial and recall its April 23, 1980 opinion, which is, we would suggest, a disservice to the court.

s/
JOSEPH T. STEARNS

Sworn to before me this
5th day of May, 1980.

s/Deborah Y. Sheridan
Notary Public

APPENDIX G

MEMORANDUM ORDER DENYING DEFENDANT'S MOTION FOR REARGUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEWART V. DIXON,

Plaintiff,

-against-

MARITIME OVERSEAS CORP.,

Defendant.

----------x

78 Civ. 5929 (IBC)

MEMORANDUM

[STAMPED: U.S. DISTRICT COURT FILED MAY 15, 1980 S.D. OF N.Y.]

IRVING BEN COOPER, D. J.

We find it extremely difficult to suppress our outrage at the contents of the affidavit of Joseph T. Stearns, verified May 5, 1980, submitted with his notice of application for reargument. They indicate that the field from which he harvests his arguments produces a bitter and sickly crop. He will find no market for them here.

> Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.

In re Linahan, Inc., 138 F.2d 650, 652-53 (2d Cir. 1943).

Once again, Mr. Stearns chooses not to comply with Court rules, this time with the clear language of General Rule 9(m):

> (m) A notice of motion for reargument shall be served within ten (10) days after the filing of the court's determination of the original motion and shall be made returnable within the same period of time as required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court. (emphasis added)

We did not direct the filing of any affidavits.

Putting in mildly,

> The ... motion for reconsideration sets forth absolutely no facts or controlling decisions which the court has overlooked .... [C]ounsel merely resubmits positions already rejected by the court ....

> Such total disregard for the procedures of this court is disheartening.

United States v. Nederlandsche Combinatie Voor Chemische Industrie, 75 F.R.D. 473, 475 (S.D.N.Y. 1977).

Our original determination (dated April 23, 1980) is adhered to. The motion for reargument is denied.

SO ORDERED:

New York, N.Y.
May 15, 1980

s/Irving Ben Cooper
UNITED STATES DISTRICT JUDGE

APPENDIX H

PORTION OF TRIAL TRANSCRIPT, INCLUDING "SEALED TRANSCRIPT," REGARDING TRIAL MEMORANDA

[THE COURT:...]

I remind you of what I told you before, that is not to talk about the case. Keep an open mind and remember, if anyone is late, you not only interfere with the Court's calendar but you cause an inconvenience to those who have followed the judge's directions. They don't like to wait around with anyone either. They all have problems and I am sure each one of you has your own home problems. I have mine. I am not pushing it over on you. I will take my problems as they come and I will meet them. It is just as difficult for me to come here as it is for you. So please bear that in mind. I never have yet directed a jury about time. I request them. Do we understand each other? Everybody here promptly at 10.

Take out the jury, please.

(Jury left the courtroom)

THE COURT: Mr. Dixon, would you please leave the courtroom.

(Plaintiff left the courtroom at this point).

THE COURT: Mr. Clerk, see that the door is closed.

Let the record show there is no one in the courtroom except counsel, the judge, the court reporter, the court deputy and my law clerks.

Mr. Cohen, stand up, sir. How often have you appeared before me in the 19 years I have been in this court?

MR. COHEN: Several times.

THE COURT: And you, Mr. Stearns?

MR. STEARNS: This will be the fourth.

THE COURT: Are you a member of the firm of Walker & Corsa?

MR. STEARNS: Yes, I am.

THE COURT: Take your seats.

I recognized both of you when the case was called. If you had sent your original emissaries here I might well have sent this case to be tried before another judge.

In the first place I demand that the rules of the court be observed and if that is a sin, so be it. When a judge directs something to be done it is to be done unless counsel takes an exception on the record. Does that square with your thinking, Mr. Cohen?

MR. COHEN: Absolutely.

THE COURT: And yours, Mr. Stearns?

MR. STEARNS: Yes, sir.

THE COURT: Have you ever seen any instance where I failed to do my duty according to my likes, not yours but according to mine? What about it?

MR. COHEN: Never, your Honor.

THE COURT: How about you, Mr. Stearns?

MR. STEARNS: Judge, I certainly have no reason to think that anything you have done was anything but the product of what you thought was absolutely the correct thing in the circumstances.

THE COURT: All right.

What I don't like and what I am dead against, and don't forget I have removed judges in my time before I became a judge, and I have been a judge for 40 years at least, and I have removed lawyers in my time. I was there, you were not. I stuck my neck out gladly but I did it. I don't think a judge should be overbearing and kick counsel around. But I am equally determined that no lawyer should handle a judge in such a fashion as to cause the judge aggravation. That is exactly what your Miss Collins brought about, sir, and your Mr. Schoenbeim, or something like that, Mr. Stearns.

As you know from past experience with me, I have always believed in the role of the peacemaker. I don't have to have it and I don't have to do it, and every judge is entitled to his approach with regard to being a peacemaker. It is one thing to try to get rid of a case, and I use the word "rid" with contempt. No judge should try to get rid of a case. But if a judge can find it within him to exert the role of peacemaker from the bible on, I have always advocated that he should and still do.

I don't mind telling you that I have been told by the Chief Justice of the United States through his committee that in asking me to sit elsewhere throughout this country, that is the primary reason why they were glad when I consented because this particular judge believes in the peace-making role. I don't want any credit for it. I exert more effort and am more readily spent

in doing it than I would if I sat up here and ruled "motion denied" and "objection overruled."

It isn't to save court time. I am here for life. It is to attempt to serve the litigants as best I know how, and that day will never come where I will compel anybody to do any settlement or effectuate a settlement. It is an appeal to reason, what have you got here, what can we do with it? Can we adjust it? May I help you?

Why most of these places where I have sat, California, Arizona, Colorado, Minnesota, Florida, Puerto Rico, among other places for five weeks minimum, they never heard of this. While it may sound I am immodest, their overwhelming praise has been most embarrassing. They wish their judges did the same.

I am not asking any other judge to do what he does not want to do. He calls

it as he sees it. He is making a contribution as outstanding, if not more so, than anything I can hope to achieve.

So it was in that spirit that in this case I suggested we sit down and talk and see if I could be of any help and you, both of you, have participated in proceedings of a similar nature and you know full well that if we didn't succeed the judge went out on the bench and he behaved the way a judge should act, according to his likes. Not for a moment did you ever say, Judge, don't sit, because you heard a lot of stuff in this case in chambers that would never come out in the open courtroom. You always were glad to have me go on.

And so I was dismayed when the first contact I had was a debacle and it was a debacle on November 8, 1979 because a Patricia Collins appeared for Klein, Cohen & Schwartzenberg, and a William

Bloomensheim appeared for Walker & Corsa, and I opened up and talked about the purpose of the gathering and, lo and behold, Bloomensheim behaved in a most immature fashion. In fact, to such an extent that in my own handwriting I noted as follows: "Bloomensheim quite uppity."

What did he do? He sat there as though to say, now you satisfy me, Judge. He gave me the cold stare as if to say, a waste of time. He didn't catch the judge's spirit at all and behaved in a fashion that was contemptuous.

My note on that day further states, "Collins and he to thrash matters out and write me in two weeks whether settlement can be effected. If not, set trial date, find out the estimated time of trial."

This is in my own handwriting.

We had difficulty getting an answer to the judge's inquiry as to how long the case would take for trial. We had to pursue it and pursue her to find out how long it would take.

A letter dated November 21, '79 from Miss Collins said she attempted to settle the case for $75,000 but defendant's counsel claimed to be not in a position to settle because of a third-party complaint. Because of a third-party complaint and as there had not yet been a physical examination of the plaintiff.

That is perfectly unanswerable. On 11/27, a letter from Bloomenshein, no third-party complaint would be started. He wrote that he could not evaluate settlement in that a physical examination of plaintiff had yet to take place.

Now we come to December. On December 1, 1979 -- let me read it to you.

Addressed to Collins of Klein, etc., and Bloomenshein of Walker & Corsa. Name of the case is at the top. "Dear counsel: Judge Cooper's attention has been called to your recent correspondence relating to a physical examination of the plaintiff and the doctor's report thereafter. The judge fixes the following definite" -- and the word "definite" is underscored -- "trial date: January 8, 1980 at 10 a.m. (consult the Law Journal for courtroom). Kindly advise us as to your best estimate of trial time. If the case is settled please advise us promptly so that the trial time allotted to you may be assigned to another case."

On December 10th a letter was sent from my office to counsel advising them that no estimate of trial length had been received and that requests to charge and trial memoranda were due five days before trial. I am

going to get that letter and I am going to read it into the record.

"Dear counsel: On December 1st we sent you a letter requesting that you inform us as to your best estimate of trial time. Since your reply has not been received by this date, please do so by return mail. Your trial memoranda and requests to charge are due five days before the commencement of trial."

We got a letter dated December 20th from defendant's counsel who estimated two days trial length. On the next day, to wit, December 21st, plaintiff's counel estimated two days trial length.

On January 2nd a phone call came from Mr. Max Cohen and these are the notes of my law clerks: "Called to say that he was trying to get together with defendant's counsel to 'make a disposition of the case.' However, he said he would bring the requests

to charge and trial memorandum on due date, January 3rd."

Now we come to January 3rd, phone call. Miss Collins called to inform us that her requests to charge were ready but her trial memorandum was not. She was told that Judge Cooper took a very -- that Judge Cooper took return dates very seriously and her papers should be received today. She seemed to indicate that she didn't think that a trial memorandum was due, and so my law clerk read her my letter of December 18th saying that the trial memorandum and the requests to charge were due five days before trial. She had to be told that again.

On January 3rd Bloomenshein was informed that his papers were due and that it made a great deal of difference when the papers were delivered, whether the papers were delivered on the due date or the day after. So that on the due date we didn't get what had

been requested in our letter of December 18th.

On January 4th plaintiff's requests to charge were received at 5:30 p.m. On January 3rd defendant's requests to charge were received at 5:30 p.m., January 3rd. No trial memorandum was attached and no trial memorandum from the defendant to this very moment. No request was ever made orally or in writing with an explanation as to why the judge's direction was not fulfilled. Will you give us more time? Will you do this? Will you do that? Not a word. A complete avoidance, contemptuous avoidance of the judge's requests. This may not mean much to you but it does mean a lot to me and to every self-respecting leader of the bar.

I am going to ask the name of the casualty company. I am going to ask whether these matters will be brought or not be brought to the attention of the firm. I shall send, if I have to, a

copy of these minutes.

I sat out west, I have already mentioned, and one of the judges said to me that he has done what other judges have done, that where lawyers for the casualty company have disobeyed orders of the Court, a letter was sent condemning the practice and a copy was sent to the president of the casualty company. I have never done it.

The plaintiff comes in in the flesh. We see him. In these accident cases the defendant comes in representing a casualty company. We don't see him. We don't see any officer. We see nobody, and that goes back 40 odd years with me.

I wonder whether they would approve that kind of behavior on the part of their chosen legal representative.

I repeat, it is now 2:35, close to 2:40 by the court clock. We have not received the defendant's trial memorandum

nor was there ever even the slightest mention as to why. There has been no request for an extension. There was no statement which we once in a while get, "Please, Judge, will you consider the fact I got myself tied up in another trial," and so forth and so forth. We have never failed to honor that. Or, Judge, my child was not well. Or, Judge, I was not feeling right. That person lies in his teeth who says this judge, or any judge in this court, so far as I know, would not readily grant a request no matter what inconvenience it might cause.

You must remember that when we fix a date for the submission of papers that is to enable the judge to study those papers, because right in the middle of it he may have other very, very vital matters going which demand his attention. So when I called for these papers on January 3rd I

knew I was going to have other entangelements with other matters and I wanted to take those papers with me Thursday night, not this weekend.

When January 4th, last Friday, plaintiff's counsel delivered papers -- what -- requests to charge. Requests on the voir dire were delivered earlier in the day. The trial memorandum of law for the plaintiff was delivered late on Friday afternoon, 5:30 p.m. by Collins herself. When she came in last Friday around 5:30 she was told by my law clerks that the judge was outraged about the failure to produce the papers on time, that she could be expected to hear from the judge about it on Monday, and her attitude was "flippant." That is what we are getting. Offending and being flippant too. This is the law clerk's word, flippant. She said she had the

flu and that one reason the papers were late was that the partners in her firm would not assist her with the trial memorandum.

She requested to see the judge and explain. Her requst was refused. The trial memorandum was marked received. I want the record to show the endorsement by the law clerks on the papers received.

The trial memorandum of law by the plaintiff in the upper right-hand corner in the handwriting of one of the law clerks, received 1/4/80, Room 2905, 5:30 p.m.

Defendant's requests to charge received 1/3/80, 5:30 p.m. That endorsement is in the upper right-hand corner by my law clerk.

Requests to charge for the plaintiff received 1/4/80, 12:05, Room 2905, and the initials of my law clerk.

What do you say, Mr. Cohen?

MR. COHEN: I can only humbly apologize to your Honor in regard to this failure to comply with the rule that your Honor laid down which has the express intent of assisting in the processing of these cases. However, most humbly, and abjectly, and I mean that, your Honor, Miss Collins has been suffering from a virus condition and she has come into the office even on weekends to assist. The office has been somewhat short-handed. The senior partner has been away. And we have had our resources taxed somewhat. I am not offering this, your Honor, as an excuse. There cannot be an excuse in the true sense. However, your Honor, from my heart and my soul as a member of the bar and an officer of this Court I promise this Court that a situation like this will

not crop up again and I humbly beseech the Court's forgiveness for this remission.

THE COURT: May I ask you, Mr. Cohen, have you any doubt that if we had been made aware that anybody charged in your firm with an obligation was unable to fulfill that obligation because of illness, is there any doubt in your mind that we would have extended ourselves?

MR. COHEN: I don't have the slightest doubt, your Honor.

THE COURT: Didn't it behoove someone in the firm to at least make one little telephone call? You yourself called with regard to settlement. What would it have meant for you to pick up the telephone and say, we humbly apologize to the judge for keeping him waiting but the truth of the matter is that this matter was assigned to a well meaning person in our office, Miss Collins, and she has been

afflicted with an illness and we should have announced it earlier but I don't think it is fair to keep your Honor in the dark about it and this is the reason why it is delayed.

I don't see why that didn't occur to anybody. I don't see why the judge should be kept in the dark. I don't see why a word of explanation, of ordinary decency not only between a judge and a lawyer but between ordinary human beings engaged in a mundane pursuit of some enterprise, why that does not become them.

MR. COHEN: I don't know why that movement had not taken place. I was under the impression that the papers were going in on the 3rd. As a matter of fact, the requests to charge were going in on the 3rd. I am only throwing this open as a possibility, that something else may have come in. I don't say that it was more important than this. I don't think

anything can be more important than complying with a requirement of this Court but something must have interjected itself which threw the normal wheels out of kilter and that is the only thing that is running through my mind because I know that Miss Collins is a perserver-ing person who comes in on weekends with a virus, with a fever, your Honor, and I am not trying to exaggerate, in order to keep the wheels of justice moving and to comply with the directives of the Court. I know this.

THE COURT: Counsel, it does not help me. Your answer is not exactly an evasion but you were duty bound to have covered that situation. You were apprised of it and you should have -- all you had to do was spend two, three minutes and you knew full well whether you liked the way the judge runs his courtroom or not you

should have known by this time that that kind of a statement to the judge would bring you exactly what you desired, and that is I would have waited until a half minute before the trial itself.

That is exactly why I am dead against you and dead against this kind of behavior. I want you to remember. I had to go before two-bit nobodies on the bench in my time. I know what that means. I helped remove them, and I repeat it again. How dare anybody treat all judges as though they were the same? Can you deny for a minute that this judge or any judge of this Court has not thrown himself hook, line and sinker into every single matter? Whether you agree with his rulings or not is beside the point. Have you ever doubted the spirit of the judges?

MR. COHEN: The shoulder is always to the wheel, your Honor, constantly.

THE COURT: Do you recognize what an offense this is to be ignored and not even to be given a word of explanation? It is as though you said go to hell, big-shot, you can't do us anything. If you don't like it, lump it. That is what it means.

MR. COHEN: It strikes me as being a situation that I could not conceive of but now that it has happened I must beseech your Honor's forgiveness because it was never intended in any way to refelct upon the dignity and honor of this Court of which we have always had the highest respect.

THE COURT: The trouble is, my dear counsel, that as I go around the country and talk to my colleagues I find that they feel that some of us go too far in our considerateness and that what we should do is really hit them in the teeth.

I hope I never come to that day

because it seems that the more you want it here, after being on the bench for all the years, with a simple case like this, this judge had to take the stuff home with him over the weekend. I don't tell this to you to get anybody's sympathy, I don't need to.

Mrs. Cooper was in a horrifying accident two years ago. She suffered brain damage. That is how serious it is. I have to go home and I have been sort of a male nurse gladly. She is my life and I had to divert my attention, my ordinary attention that I gave her, in order to know what this all amounted to so I could be prepared Monday morning to talk to you.

It took you two and a half hours to impanel a jury. Have you any idea the amount of exertion on a man who has been on the bench for 41 years? Did it strike you as though this was nothing more than ordinary, routine junk?

MR. COHEN: Never.

THE COURT: Didn't you see the spirit of the man?

MR. COHEN: Absolutely.

THE COURT: Do you think that kind of man should be treated this way?

MR. COHEN: No, your Honor.

THE COURT: Sit down.

What do you say, Mr. Stearns?

MR. STEARNS: Your Honor, all I can say on behalf of our office and myself is that I am sure, although I don't know the fact, I am sure in my assumption that this was an oversight and, as Mr. Cohen has said, that is no excuse. It was not intended surely as any slight to the Court or to the office or anything at all of that nature. It seems to have been an oversight. What the fact is I am not entirely sure but it seems it was simply forgotten.

THE COURT: I don't want your "it seems." I want something a hell of a lot more than that, Mister. I want a report on it or I want Walker & Corsa down here and I want right now the name of the casualty company. What is it?

MR. STEARNS: There is no casualty company involved. There is a pool of shipowners who have an insurance combination. The name of it is Assuren Ferreth Nengard. It is located in Arendal, Norway. All these maritime cases are all overseas insurance pool situations.

THE COURT: Does Walker & Corsa represent them exclusively here in New York or have they general counsel for all their affairs?

MR. STEARNS: They have no general counsel for all their affairs, no.

THE COURT: Do you want me to be satisfied with your statement, do you? "It

seems"? You didn't offer to look into this. You didn't offer as a partner to say, Judge, I will run this down, I will try to find out what the answer is. You thought you would give me that stuff because, Mr. Stearns, candidly speaking with you, I have long detected that would just exactly be what I would expect from you. You didn't think that it required you, after my recital here, to do anything more than say "it seems"? You didn't think it behooved you to look into this to see it didn't happen again?

MR. STEARNS: Absolutely --

THE COURT: Absolutely what?

MR. STEARNS: This will be looked into and I will see it will never happen again.

THE COURT: You bring Bloomenshein here tomorrow and you get a report from him. Do you understand that?

MR. STEARNS: Certainly.

THE COURT: I am not through, Mr. Stearns, stand on your feet. I want your statement that you intend to take this up with the members of your firm.

MR. STEARNS: I certainly will.

THE COURT: Do you want to order the minutes? Will you do it or shall I order the minutes?

MR. STEARNS: Of course I will do it. I just said I would do it.

THE COURT: It is now almost 3 o'clock. You will have time to take this up with them even though you devote the evening. You take it up with them and I want the answer in writing or I want you to be able to recite it on the record.

Get this clear, it all depends on what I receive from your office, Mr. Stearns, as to whether we make all of this a part of the trial record. This is either going to be the talking of a judge to lawyers

who have admitted that what was done was entirely unwarranted and should not have happened, even your "line," Mr. Stearns does that much. I could hardly see how you could dare approve of that kind of behavior no matter whether it was the delivery boy at your office or whether it was a lawyer. You have had at least the sense of protection to admit that that was not the way to handle the situation, the way it was handled.

I say again, I want action taken that will satisfy me as to the truth of the position by Walker & Corsa with regard to a matter like this.

I even waive what I said before about bringing Bloomenshein in. I take it for granted that you see the significance of talking to him and that you will recite that, and if you don't recit it to my satisfaction, and if I am not convinced, I

intend to have this a part of the trial record. Otherwise I will give directions that none of this shall be transcribed, about the Court's order.

How do you like that as a sense of fair play?

MR. STEARNS: That is fine. As I said before, I know that your Honor always acts out of a sense of conviction and is attempting to do the right thing in the right way as the Court sees it. Of course, you must admit, and I will admit this, I am sure you know it as well, there are instances that I for one and perhaps others do not agree that your approach or your choice of treatment of a particular situation is what we would do had we the exalted position that you have.

THE COURT: What would you do here?

MR. STEARNS: Sir, I would attempt to find out, as you did, why. However,

certainly with respect to the better excuse offered by Mr. Cohen, I would feel that that was absolutely sufficient. I would not take undue umbrage or undue time in light of such an explanation of what happened. It is, of course, a somewhat different thing with respect to the defendant's memorandum.

THE COURT: That being your attitude we won't need anything further. I think that in the view of the fact that you think this is of such small significance that isn't worthy of the time that the judge spent, that he shouldn't have been outraged at all, that this sort of thing happens and it might be this and it might be that and I will take a different attitude.

When you stand in a position where you can tell me what you have done for the public wheel, Mister, I will listen to you. I am grateful that you are not on any bench

if that is your estimate of how these things should be handled. If you think that rules of Court should be handled in this fashion and that a judge's own personal life should be disturbed and distressed because of the failure to honor the regulations, maybe you ought to be exposed for your lack of those values that every lawyer should have.

I don't give a hoot about your estimate. That means nothing to me. But I am the judge up here whether you like it or not. If I see fit to rail against this kind of behavior toward a judge, which you don't think a judge should put onto a lawyer, and you want to point out to me in your limited, unpardonable taking a judge who is outraged already and saying how you would treat it, discuss that also with your law firm and bring me in an answer on that.

Do they approve of that too? Did you get what I said, Mr. Stearns?

MR. STEARNS: Yes, sir.

THE COURT: You understand, I want a report on that.

MR. STEARNS: Yes, sir.

THE COURT: What are you going to report on? What phases are you going to report on tomorrow?

MR. STEARNS: The first phase, as I understand it, is the absence of the trial memo, the judge's comments, the reaction of the firm to the judge's comments and whether or not the matter has been discussed with Mr. Bloomenshein in an appropriate fashion.

The second thing is whether or not the firm has a feeling and, if so, what their feeling is about my reaction when I thought you had asked me what I would do when I indicated that my reaction perhaps would be somewhat different than yours, whether the firm feels that they wish to

criticize my statement in that respect.

THE COURT: And take this to the firm too: that there are very few judges on this bnch who decide to talk freely with lawyers on the ground that it won't do any good, that it is like bailing out an ocean, say some of them, with a teaspoon. That is the way they are built, their values, and it makes no sense to hold them to account. Just forget it.

Next will you tell them too that behind closed doors Walker & Corsa have been criticized by other judges, and the difference between the criticism from some judges and the criticism from this judge is that he puts it on the table and that I have always said that is what we should all do. I haven't succeeded. Convey that also. The high regard that you think that the firm is held in, just tell them, it does not seem to be, certainly not with a good number.

MR. STEARNS: I will tell them that.

THE COURT: I think it would be advisable that we get together on this the first thing in the morning before the arrival of the jury. I will meet with you in this courtroom at 9 o'clock tomorrow morning.

Do you understand me, Mr. Cohen?

MR. COHEN: Yes, sir.

THE COURT: Did you, sir?

MR. STEARNS: Yes, sir.

(Adjourned to January 8, 1980, at 9:00 a.m.)

SEALED TRANSCRIPT

STEWART V. DIXON

78 Civ. 5929

v.

MARITIME OVERSEAS CORP.

Before:

HON. IRVING BEN COOPER,
District Judge

January 8, 1980
10:00 a.m.

(Trial resumed)

THE COURT: Please excuse the plaintiff from the courtroom.

That leaves no one in the courtroom except those concerned with this matter.

All right, Mr. Stearns, what have you to place upon the record?

MR. STEARNS: I didn't hear you.

I have nothing to say, your Honor. I have a letter, as the Court directed, signed by Mr. Corsa of the firm of Walker & Corsa.

THE COURT: Would you read it for the record, please?

MR. STEARNS: "Honorable Irving Ben Cooper, United States Courthouse, Foley Square, New York, New York 10007.

"Reference S.S. Overseas Ohio.

"Steward Dixon - Injury August 31, 1978, Civil 5929 (IBC). Our File 422-18.

"Dear Sir:

"Writ at your order to respond to certain criticism expressed Monday, January 7, 1980, by the Court with respect to the handling of this case by William J. Blumenschein, an associate of the firm, and Joseph T. Stearns, a firm member.

"As we understand it, the Court has criticized the firm's failure to submit a trial memorandum in this case depsite clear direction from the Court that this be done by January 3, 1980 in advance of a scheduled January 8, 1980 beginning of trial in this case.

"The firm has discussed this matter with Mr. Blumenschein and I have discussed it with Mr. Stearns. The criticism of Mr. Stearns personally has to do with his response to the Court's inquiry regarding what he thought should be done in the circumstances of the attorneys for defendant's failure to file a trial memorandum.

"Mr. Blumenschein has assured the firm that no disrespect or disservice to the Court was intended in that it was believed that the law applicable to the case was covered in requests to charge which were filed with the Court in timely fashion.

"The failure to file the brief was in part due to the press of other matters and this fact is brought to the Court's attention not as an excuse but in further explanation of the point earnestly made that no disrespect was intended.

"With respect to the criticism of Mr. Stearns of January 7, 1980, the firm can only say that Mr. Stearns has reported that his comments with respect to what he would have done in like circumstances, i.e., what he would do in response to the firm's failure to file the requested brief were intended as expressions of a personal view at the time and were likewise not intended as expressions

of disrespect for the Court.

"Mr. Blumenschein has indicated to the firm that he was not uppity at the pretrial conference on this case last fall as the Court has indicated.

"We trust that this is a sufficiently complete response but stand ready to make such further elaboration as the Court deems appropriate."

"This letter is signed by me on behalf of the firm and has been brought to the attention of the members with the exception of Mr. Walker who is at present on business in Rio de Janeiro."

"Very truly yours,

"Walker & Corsa, by

"LeRoy S. Corsa."

(Copy to Chief Judge Honorable David N. Edelstein)."

THE COURT: Mark that, Mr. Clerk, as a Court exhibit.

(Court Exhibit 1 received)

THE COURT: Is there anything else you wish to say, Mr. Stearns?

MR. STEARNS: No.

THE COURT: Anything you wish to say, Mr. Cohen.

MR. COHEN: No, sir.

THE COURT: Let the record speak for itself. I doubt very much whether a completely accurate report was made by Mr. Stearns to the firm of just what it is that he, Mr. Stearns, said as to how he would have handled the situation were he the judge.

That not only is disrespectful, it is typical of someone saturated with conceit who has not even a nodding acquaintance with humility.

The court reporter is directed not to type up any part of this matter which commenced yesterday afternoon after the close of summations until directed by the Court.

The Court may see fit at a later time to do otherwise but until the Court does otherwise that material, Mr. Court Reporter, you will clearly understand is not to be transcribed.

Have I made myself clear, sir?

MR. STEARNS: If I may make this application in view of the Court's attack on my personal integrity, I move for a mistrial in this case.

THE COURT: Denied.

(Recess)

...

APPENDIX I

EXCERPTS FROM TRIAL TRANSCRIPT

[MR. STEARNS: ....]arthroscopy, is that correct, that this surgical instrument be inserted and that the doctor look and see what he could find, is that right?

A. Yes, I see it. It's at the bottom of the page to which you are referring. They felt there was enough wrong with the knee to warrant all these complicated tests. An arthroscopy examination is done under general anesthesia.

THE COURT: They wouldn't be taking all these steps unless there was something more than a scrape on the knee, is that not so?

THE WITNESS: Exactly, your Honor.

THE COURT: Next question.

MR. STEARNS: For the record --

THE COURT: You don't like that question?

MR. STEARNS: No, sir, I don't.

THE COURT: You have a right not to like it. I like it and I wanted to make that clear to the jury. It doesn't help you any and you don't like it for that reason. I want it and it's there.

MR. STEARNS: I say it's improper.

THE COURT: Do you? That is your notion. Strike the insolence of counsel.

Next question.

Q Mr. Dixon refused, did he not --

MR. COHEN: I object, your Honor. There is no requirement that a man be subjected willingly to an operation. I don't know of any requirement in the law and any inferences to be drawn from that are to be, in my opinion, stricken from that question. I think it's improper.

THE COURT: What do you say to that?

MR. STEARNS: I say the purpose of the arthroscopy was an attempt, the

suggestion, the recommendation if that is what the records reflect, was a suggestion made by the doctors in view of the continuing complaints of Mr. Dixon now in April 1979 over a span of some eight months and that Mr. Dixon's refusal to proceed with this additional test which is of diagnostic value is suggestive of the fact that Mr. Dixon truly knows the condition of his knee and truly knows that any such further test would be unnecessary and would be negative.

MR. COHEN: If your Honor please, I am going to object to the comments made by counsel. He is not a physician.

THE COURT: Not only that, but I direct the jury to disregard the comments. I think that was an unfair response to the Judge's inquiry and I don't see what we gain by this line of undertaking. The doctor has already told us the purpose of this particular instrument and its

limitations. What you propose to do with it does not shape up, in my mind, as being within the purview of proper cross-examination. The objection is sustained, sir. Go to something else.

Q On July 17, 1979 there was an examination by yet another doctor at the general clinic.

A Yes.

Q As a result of that examination plaintiff was found to be FFD, and that means fit for duty?

A Yes.

Q It also indicatd, does it not, that the physical examination showed no swelling, no redness, no deformity, full range of motion, no apparent subluxation of tendons, quadricep extensor and flexor strength are adequate and symmetrical bilaterally.

A That is what it reads from the general clinic.

Q And that means that the testing of quadricep strength some three months after your examination of April 4, 1979 was contrary to what you found negative, is that right?

A It reads contrary but you have to keep in mind that this is a doctor whose field of work is really internal medicine and not orthopedics and I wouldn't downgrade him on orthopedics. He is not an orthopedist. He handles everything that comes into the general clinic.

Q And he may be the most capable general doctor in the world?

A It may be.

MR. COHEN: Objection.

THE COURT: Overruled.

Q And he could well be because of his gift a better person, a better doctor to evaluate this question than some other doctor including some other orthopedist?

MR. COHEN: Objection.

THE COURT: Let him do it.

A Highly unlikely that they would put an orthopedic specialist in a general clinic. I would feel inadequate to handle a general clinic but I am out of medical school over 40 years.

THE COURT: Next question.

Let me interrupt you, Doctor, I want to follow this as much as the jury. There comes a time when I have to charge the jury on the law, and I have to know what the facts are in order to be able to sensibly charge the jury as to the law. Am I mistaken, and if I am don't hestiate to correct me, was it not your position that you repeated, almost at

the very outset of your testimony on direct this morning, that these conditions, that have been repeatedly pointed out to you in the reports of the hospitals, were at an early stage after the injury was incurred, and that you said in effect you told the jury under oath, that by no means is it at all uncertain or unlikely, and in no conflict with what you found at the time that you were told to undertake the examination?

THE WITNESS: Not exactly, your Honor.

THE COURT: Then correct it.

THE WITNESS: What I said was that I based my opinions upon the history I take from the patient, the examination I find and the x-rays that I take. I take some small factors into account but not very much of what is written in other hospital records particularly when the

records are written by people who are not fully trained in orthpedics.

THE COURT: I don't think I put my question properly. Did you not say there was no inconsistency between finding no evidence of fracture, shortly after the incident occurred, and finding affirmatively evidence of fracture eight months after the episode?

THE WITNESS: Yes, basically I said that. I am quite sure Mr. Stearns will bring it out in much more detail.

THE COURT: I am not concerned with what he will bring out. I am concerned with an answer to my question. I said there was no inconsistency.

THE COURT: And you still stick to that?

THE WITNESS: Yes, sir.

* * *

THE COURT: I've got it.

Anything else now? Any other motions?

MR. STEARNS: Let me just say one thing and I say it with all respect and I do not intend to be provocative but I do have to note on the record the fact that it is my belief that the Court improperly interfered with my examination of Dr. Seaman and seemed to, as I saw it, suggest some partisanship on behalf of the plaintiff's position on the medical issues in this case.

THE COURT: And therefore --

MR. STEARNS: I ask for a mistrial.

THE COURT: Application denied.